

No. 12735

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United States  
Court of Appeals  
for the Ninth Circuit.

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H. L. JONES,

Appellant,

vs.

BARTELDES SEED COMPANY, a Corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Northern Division

FILED

FEB 10 1951

PAUL P. O'BRIEN.  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES OF ATTORNEYS

MULL & PIERCE,

FRED R. PIERCE,

Capital National Bank Bldg.,  
Sacramento, California,

Attorneys for plaintiff and respondent.

JAMES I. HARKINS,

ALBERT E. CRONIN,

300 American Trust Building,  
Stockton, California,

Attorneys for defendant and appellant.



In the District Court of the United States in and  
for the Northern District of California,  
Northern Division

No. 6067

THE BARTELDES SEED COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

H. L. JONES, Individually and Doing Business  
Under the Style and Trade Name of STAND-  
ARD SEED FARMS COMPANY,

Defendant.

## COMPLAINT

Plaintiff alleges:

### I.

That the plaintiff is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Colorado; that the defendant is an individual doing business under the style and trade name of Standard Seed Farms Company, with his residence and main business headquarters located at Stockton, California.

### II.

That "Yellow Globe Danvers" is now and at all times hereinafter mentioned was a particular variety or type of onion, well known to, and catalogued, grown, cultivated, harvested, stored, bought and sold

by, the garden seed trade, industry and onion growers throughout the United States; "Yellow Globe Danvers" onion is uniformly and generally recognized by the seed trade, industry and onion growers and experts as a variety or special type of onion, possessing and generally known for certain qualities and characteristics and in particular, superior keeping and storing qualities. That it is impossible by examination, inspection or otherwise to recognize or identify the variety or type of any onion from the seed thereof. The variety and type can be determined only from the sets or mature onions after the seed is planted and grown. Accordingly, a buyer of onion seed must depend and rely upon the sellers' designation, description and representation of the variety or type of the onion seed sold.

### III.

That on or about October 20, 1943, the defendant solicited and offered to sell plaintiff about two thousand (2000) pounds of "Yellow Globe Danvers" onion seed at the price of Two dollars and fifty cents (\$2.50) per pound; that plaintiff accepted said offer and requested delivery thereof to it at Denver, Colorado; that on or about October 28, 1943, defendant delivered to plaintiff at Denver, Colorado, two thousand and five (2005) pounds of onion seed tagged, labeled, billed, described and otherwise represented as "Yellow Globe Danvers" onion seed; that relying upon said offer and said bill, description and representation by defendant that said onion seed was "Yellow Globe Danvers" onion seed, plaintiff

accepted such delivery and thereupon paid defendant Five Thousand Twenty-nine and 30/100 (\$5,029.30) Dollars for said seed.

#### IV.

That plaintiff was unable to identify the variety or type of said onion seed by examination, or otherwise, and relying upon defendant's said designations and representations aforesaid and believing in good faith said onion seed to be "Yellow Globe Danvers" onion seed, plaintiff resold approximately two thousand (2000) pounds thereof, one thousand (1000) pounds thereof being resold and delivered to Dutch Valley Growers, Inc., an onion set cooperative growers' marketing association incorporated under the laws of the State of Illinois, on or about November 19, 1943, as "Yellow Globe Danvers" onion seed; that said Dutch Valley Growers, its members and customers, planted, or caused to be planted, cultivated and matured into sets said seed, after which it complained to plaintiff that said sets shrivelled, sprouted, decayed, kept poorly, and did not have the typical characteristics, shape or fine and desirable qualities of "Yellow Globe Danvers" onion, and in fact was not "Yellow Globe Danvers" onion or onion set. That plaintiff promptly advised defendant of said complaints and requested defendant to inspect said onion sets grown from seed so sold by defendant and verify said complaints, which defendant failed or refused to do; that thereafter said Dutch Valley Growers sued plaintiff in the United States District Court for the District of Colorado, being Civil Action No. 1405 demanding judgment for

Thirty-four Thousand Three Hundred Eighty-seven and 28/100 (\$34,387.28) Dollars and costs, because of said defendant's false sale of said onion seed and the loss of crops therefrom; that plaintiff requested defendant to appear and defend said case, which defendant failed or refused to do; that plaintiff was required to and did defend said suit, which necessitated taking numerous depositions in California, Illinois, Washington, D. C., and elsewhere, consumed one week in court trial before court and jury and caused plaintiff to expend Seven Thousand Four Hundred Two and 59/100 (\$7,402.59) Dollars for attorneys fees, court costs, traveling and other legal expenses, and plaintiff owes and has promised to pay an additional One Thousand Dollars (\$1,000.00) attorneys' fees; that said litigation extended over a period of approximately three years; that the jury in said case brought in a verdict for said Dutch Valley Growers and against this plaintiff, sustaining the complaints and allegations of said Dutch Valley Growers and judgment was rendered against this plaintiff for Four Thousand Six Hundred Eighty-four and No/100 Dollars (\$4,684.00) plus costs of Three Hundred Twenty-two and 26/100 Dollars (\$322.26); that plaintiff gave defendant an opportunity to pay said judgment or appeal same, which defendant failed or refused to do; fearing that a new trial, if granted, or an appeal would result in a larger judgment against plaintiff, plaintiff paid said judgment and costs and now seeks to recover the amount thereof from defendant, plus interest from the date of payment.

## V.

That plaintiff has paid Seven Thousand Four Hundred Two and 59/100 Dollars (\$7,402.59) for attorneys' fees and legal expenses, and plaintiff owes and has promised to pay an additional One Thousand Dollars (\$1,000.00) attorneys' fee in the defense of said Dutch Valley Growers case, which fee and expenses are reasonable and fair, and which plaintiff seeks to recover from defendant herein.

## VI.

That defendant's said identification, labels, tags, bill and said other descriptions and representations made by defendant concerning said two thousand five (2005) pounds of onion seed were false and made in wanton or reckless disregard and violation of plaintiff's rights, feelings and reputation, and were calculated to and did specifically damage plaintiff aforesaid, and also caused plaintiff to suffer detriments incidental thereto, and to suffer substantial loss of good will and to sustain injury to its reputation with its customers and the seed trade and industry generally, in the sum of Ten Thousand Dollars (\$10,000.00), which plaintiff seeks to recover from defendant.

## VII.

That the United States of America by and through its United States Attorney for the Northern District of California, did on the 26th day of June, 1946, file an information against defendant herein, in Case No. 9701 in the District Court of the United States for the Northern District of California, charging

this defendant with falsely labelling and advertising, within the meaning of the Federal Seed Act of 1939, the two thousand five (2005) pounds of seed involved here, in that said seed was designated as "Yellow Globe Danvers" onion seed, whereas it was not "Yellow Globe Danvers" onion seed; that thereafter said court assessed a fine against defendant herein for such false labelling and advertising; that defendant did pay the fine so assessed.

### VIII.

That, although plaintiff has demanded of defendant that he reimburse it for the payment of said judgment and costs in said Dutch Valley Growers case, pay the attorneys' fee and legal expenses incident to the defense thereof, pay it for the loss of good will, damage to its reputation and incidental detriments, defendant fails and refuses to do so.

### IX.

That it is necessary for plaintiff to employ attorneys, pay court and service costs, deposition and traveling expenses and incur other expenses incident to the litigation, to protect its rights and enforce its claims against the defendant, the amount and extent of which cannot be ascertained now, but which is tentatively estimated to be about Seven Thousand Five Hundred Dollars (\$7,500.00) which sum would be reasonable, and judgment for which is sought by plaintiff against defendant.

Wherefore, Plaintiff prays judgment against defendant in the sum of Thirty Thousand Nine Hun-



dred Eight & 85/100 Dollars (\$30,908.85), together with legal interest thereon, for costs of suit herein expended, and for such other and further relief as to the court may seem meet and proper in the premises.

Dated: November 8th, 1948.

MULL & PIERCE,

/s/ F. R. PIERCE,

HUFFMAN, SUTLIFF AND  
ROGERS,

/s/ RANGER ROGERS,

Attorneys for Plaintiff.

[Endorsed]: Filed November 8, 1948.

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At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 31st day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Dal M. Lemmon,  
District Judge.

No. 6067

[Title of Cause.]

MINUTE ORDERS DEC. 31, 1948

The motion to dismiss, the motion to strike and the motion for a more definite statement having been

heretofore heard and submitted, being now fully considered, it is Ordered that the motion to dismiss be and the same is hereby denied. It is further Ordered that defendant's motion to strike be and the same is hereby denied as to paragraph VI, of the complaint, and granted as to paragraph VII and IX of the complaint. It is further Ordered that the defendants motion for a more definite statement be and the same is hereby denied. It is further Ordered that the defendants have 15 days from the date hereof within which to file their answer.

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[Title of District Court and Cause.]

### ANSWER

Comes now the defendant in the above-entitled action and for answer to the plaintiff's complaint herein admits, denies, avers and alleges as follows:

#### I.

Answering paragraph II of plaintiff's complaint on file herein defendant denies that the variety or type of onion known as "Yellow Globe Danvers" possesses and is generally known for superior keeping and storing qualities.

#### II.

Answering paragraph III of said complaint defendant denies that on or about October 20th, 1943, or at any other time, or at all, he solicited and offered to sell to plaintiff any quantity of "Yellow Globe Danver" onion seed at the price of Two and

50/100 (\$2.50) Dollars per pound, or at any other price; alleges that prior to October 20th, 1943, defendant, as is the yearly custom of those engaged in the seed farm business, mailed to the plaintiffs and divers others in the seed business, a list containing the names of the seed that the defendant had in stock and the approximate price, which price would be subject to defendant's confirmation; that on or about October 20th, 1943, plaintiff offered to purchase from the defendant approximately two thousand (2,000) pounds of onion seed having the characteristics of "Yellow Globe Danvers" onion seed at the price of Two and 50/100 (\$2.50) Dollars per pound, shipment to be made f.o.b. Stockton, California; that defendant accepted such offer and delivered to the Independent Freight Lines at Stockton, California, on or about the 20th day of October, 1943, twenty (20) bags of onion seed of the characteristics of "Yellow Globe Danvers" to be shipped f.o.b. Stockton, California, to the plaintiff in Denver, Colorado; that on the invoice covering said shipment there was printed a non-warranty notice substantially as follows:

"Disclaimer—The Standard Seed Farms Co. gave no warranty express or implied as to description, purity, productiveness or any other matter of any seeds they send out and they will not be in any way responsible for the crop";

alleges that each and every bag or package containing said onion seeds in the aforementioned shipment contained a card or slip upon which was printed a non-warranty clause substantially as follows:

“The Standard Seed Farms gives no warranty express or implied, as to the description, quality, productiveness or any other matter, of seeds, bulbs or plants it sends out and that they will not in any way be responsible for the crop.”

Further answering paragraph III of said complaint defendant alleges that the plaintiff prior to the commencement of this action had purchased the seeds from the defendant, and that in each instance when he so purchased seeds from the defendant there was boldly printed on each letter, and on each package of seed, the notice of non-warranty aforementioned; that the plaintiff itself in the seed business at the time it received the aforementioned shipment of seed, well knew and was fully advised of, and plaintiff itself used the non-warranty of description or quality or productiveness or failure of the crop, and hence knew that the contract was only for onion seed and the characteristics of the different types would not be warranted;

And further answering paragraph III of said complaint, defendant denies that at the time he accepted plaintiff's seed offer, or at the time of filling said order, or at the time of shipping said onion seed to the plaintiff, or at any other time, defendant did warrant and represent, or did warrant or represent to the plaintiff that the said onion seed so ordered from the defendant by the said plaintiff, and so shipped by said defendant to said plaintiff, was of the variety known as “Yellow Globe Danvers” seed.

## III.

Answering paragraph IV of said complaint defendant denies that fully or otherwise, or at all, relying upon any representations or warranty of said defendant, said plaintiff re-sold approximately two thousand (2,000) pounds of said onion seed, and in particular one thousand (1,000) pounds to the Dutch Valley Growers, Inc.

Alleges that he has no information or belief as to the other matters set forth in paragraph IV of plaintiff's complaint sufficient to answer the same, and for that reason and placing his denial on that ground, denies generally and specifically, conjunctively and disjunctively, each, all and every allegation therein contained;

Further answering the allegations of paragraph IV of said complaint, defendant denies that by reason of the premises, or by reason of any fact or by reason of any act or omission of this defendant, or otherwise, or at all, the plaintiff herein was sued by the Dutch Valley Growers in the United States District Court for the District of Colorado, Civil Action No. 1405, or that plaintiff was compelled to and did expend the sums alleged and set forth in said paragraph IV for attorneys' fees, costs of suit and payment of judgment, or any sum whatsoever.

## IV.

Alleges that he has no information or belief upon the subject matter of paragraph V of said complaint sufficient to enable him to answer the same, and placing his denial upon that ground denies that plaintiff has paid the sum of Seven Thousand Four

Hundred Two and 59/100 (\$7,402.59) Dollars, or any other sum for attorneys' fees and legal expenses or that plaintiff owes and has promised to pay an additional One Thousand (\$1,000) Dollars or any other sum, as attorneys' fees in the defense of said Dutch Valley Growers case, or that said fee and expenses, if any, are reasonable, and/or fair.

## V.

Answering paragraph VI of said complaint, alleges that in compliance with plaintiff's offer, said defendant, in good faith and in the usual and ordinary course of business, attempted to fill the order of said plaintiff in compliance with its directions, and then and there shipped to said plaintiff at the time in said complaint mentioned, onion seed which the said defendant, then and there verily believed and then and there had reason to believe was in fact onion seed of the characteristics of "Yellow Globe Danvers," that in pursuance to and in compliance with the general established usage and custom of the seed business in the State of California, and the United States, and in compliance with and in conformity to his own usage and custom in that behalf, the said defendant enclosed with the bag or package containing said seed a slip on which was printed substantially as follows:

"The Standard Seed Farms Co. gives no warranty, express or implied, as to description, quality, productiveness, or any other matter, of seeds, bulbs, plants or trees they send out, and they will not be responsible in any way for the crop."

Alleges that the plaintiff prior to the commencement of this action had, at various and sundry times, purchased seeds from defendant, and that in each instance when it so purchased from this defendant, each package of seeds delivered by defendant to plaintiff contained the said slip upon which was printed the said notice of non-warranty as aforesaid; that the plaintiff at the time of ordering said onion seed of the characteristics of "Yellow Globe Danvers," and at the time it received the same, well knew and was fully advised and had notice of the general established usage and custom of the seed trade in the State of California, and the United States herein mentioned; and of the established usage and custom of defendant; that this defendant in no instance sold any seed with any warranty, express or implied as to description, quality or productiveness or failure of the crop, and that with each package of seed sold or delivered by defendant that there was contained a printed slip giving notice that the said defendant gave no warranty express or implied as to the description, quality, productiveness or the failure of the crop, and that the defendant would not be responsible for any crop produced from the seeds shipped by him; that plaintiff being itself in the seed business knew full well of the usage and custom of the trade as to the non-warranty of the description, quality, productiveness or failure of the crop of the seed sold;

Further answering paragraph VI of said complaint, defendant denies that plaintiff has been damaged in the sum of Ten Thousand (\$10,000)

Dollars, or in any other sum, or at all; denies that plaintiff has suffered loss of good will and/or injury to its reputation by reason of any act of said defendant.

For a Further and Separate Defense herein defendant alleges that his business has been established and conducted in the State of California for a period of about thirty-two (32) years, and at all times in said complaint mentioned, and for many years prior thereto, it has been and still is the general and well established custom and usage of the seed trade throughout the State of California, and the United States, among persons, firms and corporations engaged in the seed business, and among persons purchasing seeds, that the seller of seeds gives no warranty, express or implied, as to description, quality or productiveness of any seed sold, and that the seller will not be in any way responsible for the crop and that at all times in said complaint mentioned, and for many years prior thereto, it has been and still is the well established particular usage and custom of the said defendant in selling seeds that he gives no warranty, express or implied, as to description, quality, productiveness, or any other matter of seeds sent out and that he will not be responsible for the crop; and that the said plaintiff was at all times in said complaint mentioned, and for many years prior thereto had been, thoroughly familiar with and had full knowledge and notice of such general and well established custom and usage of the seed trade throughout the State of California and the United States, among persons, firms and corpo-



rations engaged in the seed business in the State of California and the United States, and of the said particular custom and usage of the defendant herein, and that the said plaintiff had at all times and on each and every occasion that it purchased any seeds from this defendant, and particularly on the occasions referred to in said complaint, such knowledge and notice and that the said plaintiff contracted in the purchase of said seeds from defendant with reference to the said well established custom and usage of the seed trade in the State of California and in the United States, and of the said particular custom and usage of this defendant, and that the same formed a part of the contract of purchase and sale of the seeds herein specifically mentioned.

And further alleges that said contract referred to in said complaint was for delivery of onion seed, and that said contract was fully performed by the delivery of said onion seed f.o.b. Stockton, California, and that defendant made no representation as to characteristics or descriptions of the seed delivered; and that as a result thereof there was no breach or representation or warranty.

Wherefore, defendant prays that plaintiff take nothing by reason of this action, and that defendant have judgment for his costs and disbursements herein, and for such other and further relief as to the Court may seem meet and proper.

/s/ JAMES I. HARKINS,

Attorney for defendant.

State of California,  
County of San Joaquin—ss.

H. L. Jones being first duly sworn, deposes and says:

That he is the defendant named in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

/s/ H. L. JONES.

Subscribed and sworn to before me this 15th day of January, 1949.

[Seal] /s/ JAMES I. HARKINS,  
Notary Public in and for the County of San  
Joaquin, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1949.

[Title of District Court and Cause.]

### MEMORANDUM

The weight of authority is that the plea of *nolo contendere* is for all purposes considered a plea of guilty except in one situation, namely, that the defendant is not estopped from denying the facts to which he plead *nolo contendere* in a subsequent civil action. Cases cited and see *Yale Law Review*, Vol. 51 at page 1255.

Since defendant's counsel states in his closing brief that he is willing to admit that the plea of nolo contendere was entered for the limited purpose of impeachment no ruling is necessary at this time.

Dated: May 10th, 1949.

/s/ DAL M. LEMMON,  
United States District Judge.

[Endorsed]: Filed May 10, 1949.

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[Title of District Court and Cause.]

### PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Honorable Dal M. Lemmon, District Judge, on March 21, 1949. Plaintiff was represented by Ranger Rogers, Esq., and A. M. Mull, Jr., Esq., and the defendant was represented by James I. Harkins, Esq., and Albert Cronin, Esq.

State of Nature of Case:

Action for breach of contract for damages sustained because of failure to deliver variety of onion seed ordered. Plaintiff, The Barteldes Seed Company, is a Colorado corporation, and defendant is H. L. Jones, of Stockton, California, an individual doing business as Standard Seed Farms Company.

Defendant reserves the right to contend that the action is one for breach of warranty.

The elements of damage claimed by plaintiff are three: (1) reimbursement of plaintiff for the amount of judgment and costs paid by plaintiff as

the result of an action for breach of contract brought against plaintiff in the United States District Court for the District of Colorado by the purchaser from the plaintiff of a portion of the seeds involved in this action; (2) attorneys fees and expenses necessitated in the defense of said action; and (3) loss of good will and related matters suffered because of resale of seeds involved in this action.

#### Admissions and Identification of Exhibits:

Plaintiff offered in evidence a certified copy of complaint, verdict, judgment, and satisfaction of judgment docket in the matter of Dutch Valley Growers, Inc., vs. The Barteldes Seed Company, Civil Action No. 1405 in the United States District Court for the District of Colorado. These documents were marked Plaintiff's Exhibit No. 1 and admitted in evidence.

Plaintiff then offered in evidence certified copy of transcript of the judgment docket in the above referred to case. This was marked as Plaintiff's Exhibit No. 2 and admitted in evidence.

Plaintiff then offered in evidence a statement of attorneys fees and costs paid by the defendant, The Barteldes Seed Company, in the litigation above referred to in the United States District Court in Colorado. The defendant admitted that these were paid by The Barteldes Seed Company, but denied that they were or are reasonable or necessary expenditures in the defense of the said Civil Action No. 1405. With this understanding the statement was identified as Plaintiff's Exhibit No. 3 and admitted in evidence.

Plaintiff then offered in evidence Customer's Draft dated October 20, 1943, which was marked Plaintiff's Exhibit No. 4 and admitted in evidence. It was stipulated that said draft was paid by plaintiff herein.

On agreement of counsel, a telegram dated October 20, 1943, from The Barteldes Seed Company to Standard Seed Farms Company, Stockton, California, was marked as Plaintiff's Exhibit No. 5 for identification, and it was agreed that the said exhibit could be offered in evidence without further proof by either party, and that it could be received in evidence without further identification if otherwise admissible.

A letter dated October 21, 1943, from The Barteldes Seed Company to Standard Seed Farms Company, was marked as Plaintiff's Exhibit No. 6 for identification, and it was agreed in regard to this exhibit that it could be offered in evidence without further identification at the time of the trial by either party.

It was next stipulated and agreed that certain onion sets identified by the United States Department of Agriculture, War Food Administration, Division of Distribution, Inspection Certificates Numbered B-55718, B-55719 and B-55720 were taken from warehouses near South Holland, Illinois, used by the growers of said onion sets, by an agent or inspector of the Department of Agriculture and were by him forwarded, through official channels, to Dr. H. A. Jones of the Department of Agriculture, whose address is Beltsville, Maryland.

It was stipulated and agreed that said onion sets identified by Inspection Certificate No. B-55718 were grown by C. W. Pearlberg at or near South Holland, Illinois, during the season of 1944; that said onion sets identified by Inspection Certificate No. B-55719 were grown by A. Dalanberg at or near South Holland, Illinois, during the season of 1944; and that said onion sets identified by Inspection Certificate No. B-55720 were grown by John K. DeYoung at or near South Holland, Illinois, during the season of 1944.

Defendant then offered in evidence Defendant's Exhibit A a memorandum that a bill of lading had been issued. It was stipulated and agreed that Defendant's Exhibit A, although not the original bill of lading, could be admitted in evidence and for the purposes of the case treated as though it were the original.

The court then asked for memoranda in regard to the admissibility of a plea of nolo contendere in evidence. At the time of the signing of this order these have been duly submitted.

Dated the 16th day of May, 1949.

/s/ DAL M. LEMMON,  
Judge.

Approved as to form:

/s/ RANGER ROGERS,  
Attorney for Plaintiff.

/s/ JAMES I. HARKINS,  
Attorney for Defendant.

[Endorsed]: Filed May 16, 1949.

[Title of District Court and Cause.]

### MEMORANDUM AND ORDER

Plaintiff purchased onion seed from the defendant and later sold a portion of it. The buyer of this portion sued plaintiff on the theory that the onion seed was not of the variety specified. Judgment was recovered in the United States District Court for the District of Colorado in favor of the buyer and against plaintiff. The judgment was satisfied in full by plaintiff. Plaintiff seeks to recover from defendant the amount of said judgment, costs and attorneys' fees expended in that action, and damages for loss of good will arising out of that transaction. The complaint also sought the estimated attorneys' fees incurred and to be incurred in the present case, but the paragraph therein alleging the same has been disposed of by the granting of a motion to dismiss thereto.

Defendant in the course of his business as a seed grower and seller sent a "surplus list," a statement of quantities and varieties of seed for sale, to the plaintiff, in which was listed a quantity of "Yellow Globe Danvers" onion seed. Plaintiff by telephone from its office in Denver, Colorado, to defendant in California offered to buy 2000 pounds of said seed at \$2.50 per pound. After some discussion of price this order was accepted by the defendant; it being agreed that the seed would be shipped by truck f.o.b. Stockton, California. No mention was made in that conversation of warranty or refusal to warrant. A telegram confirming the order was sent by plaintiff

and each party sent letters confirming the sale. Printed on defendant's letterheads were non-warranty clauses, and the "surplus list" also set forth such a clause. The seed was shipped and a draft with bill of lading was sent. The draft was honored by plaintiff.

Thereafter the seed was re-labeled by plaintiff and a portion of it sold with the resultant suit in Colorado.

It is contended by plaintiff that the sale was completed in Colorado, inasmuch as it was necessary that the draft be honored before plaintiff could take possession of the seed. On the other hand defendant contends that the transaction was completed when the seed was delivered to the carrier at Stockton, California. Plaintiff therefore argues that the law of Colorado is the applicable law, while defendant argues that California law should be applied.

It seems to me that a consideration of the basic elements in the creation of a contract dispels most of the questions that appear to complicate this case.

The evidence is clear that plaintiff ordered a quantity of "Yellow Globe Danvers" onion seed by that name and that this designates a variety of onion seed that is distinctive and well known in the trade. Plaintiff's offer was accepted by defendant. It is elementary that where an offer to buy certain goods at a certain price is accepted by the seller a contract is made. Where such a contract is made orally and later confirmed in writing the contract can not be varied by additional terms or conditions, unless the parties mutually



intend to alter the original agreement. Therefore the mere fact that the oral agreement was confirmed by a writing upon which a printed non-warranty clause appeared as part of the letterhead is not sufficient to incorporate said clause as one of the contractual terms. A disclaimer of warranty coming after the contract was completed is of no effect. *Newhall Land & Farming Co. v. Hogue Kellogg Co.*, 56 Cal. App. 90.

Plaintiff therefore had offered to buy a specific commodity and defendant had agreed to sell a specific commodity. The fact that the defendant did not perform resulted in a breach of contract. The question of warranty in such a case would appear to be academic since the designation of the specific type of seed appears more in the nature of a condition. The agreement to sell "Yellow Globe Danvers" onion seed was an express warranty, if not a condition, that the seed shipped was of that variety. Uniform Sales Act, Sec. 12. This was an affirmation of fact by express language, relied upon by plaintiff and without which the purchase would not have been made. Nevertheless, because the Uniform Sales Act, which has been adopted by both California and Colorado, fixes an implied warranty that the goods shall correspond to the description in a contract to sell or a sale of goods by description, it is difficult to ignore the question of warranty whenever such a sale is made. "Yellow Globe Danvers" is an article of commerce. It is a distinctive seed, well known in the trade. A dealer in such a commodity selling it under or by that name is charged with notice

and each party sent letters confirming the sale. Printed on defendant's letterheads were non-warranty clauses, and the "surplus list" also set forth such a clause. The seed was shipped and a draft with bill of lading was sent. The draft was honored by plaintiff.

Thereafter the seed was re-labeled by plaintiff and a portion of it sold with the resultant suit in Colorado.

It is contended by plaintiff that the sale was completed in Colorado, inasmuch as it was necessary that the draft be honored before plaintiff could take possession of the seed. On the other hand defendant contends that the transaction was completed when the seed was delivered to the carrier at Stockton, California. Plaintiff therefore argues that the law of Colorado is the applicable law, while defendant argues that California law should be applied.

It seems to me that a consideration of the basic elements in the creation of a contract dispels most of the questions that appear to complicate this case.

The evidence is clear that plaintiff ordered a quantity of "Yellow Globe Danvers" onion seed by that name and that this designates a variety of onion seed that is distinctive and well known in the trade. Plaintiff's offer was accepted by defendant. It is elementary that where an offer to buy certain goods at a certain price is accepted by the seller a contract is made. Where such a contract is made orally and later confirmed in writing the contract can not be varied by additional terms or conditions, unless the parties mutually

intend to alter the original agreement. Therefore the mere fact that the oral agreement was confirmed by a writing upon which a printed non-warranty clause appeared as part of the letterhead is not sufficient to incorporate said clause as one of the contractual terms. A disclaimer of warranty coming after the contract was completed is of no effect. *Newhall Land & Farming Co. v. Hogue Kellogg Co.*, 56 Cal. App. 90.

Plaintiff therefore had offered to buy a specific commodity and defendant had agreed to sell a specific commodity. The fact that the defendant did not perform resulted in a breach of contract. The question of warranty in such a case would appear to be academic since the designation of the specific type of seed appears more in the nature of a condition. The agreement to sell "Yellow Globe Danvers" onion seed was an express warranty, if not a condition, that the seed shipped was of that variety. Uniform Sales Act, Sec. 12. This was an affirmation of fact by express language, relied upon by plaintiff and without which the purchase would not have been made. Nevertheless, because the Uniform Sales Act, which has been adopted by both California and Colorado, fixes an implied warranty that the goods shall correspond to the description in a contract to sell or a sale of goods by description, it is difficult to ignore the question of warranty whenever such a sale is made. "Yellow Globe Danvers" is an article of commerce. It is a distinctive seed, well known in the trade. A dealer in such a commodity selling it under or by that name is charged with notice

that the buyer relies upon the description as a representation that it is the thing described. This constitutes a warranty that the seed sold is of that description. *Smith v. Zimbalist*, 2 Cal. App. 2d 324. Thus, in this case, since there was a contract to sell and consequent sale of goods by description, a warranty that the goods were of the class denominated was created by operation of law as well as in fact. (*El Zarape, etc., Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 345. See also *Chamberlain Co. v. Allis Chalmers Co.*, 51 Cal. App. 2d 520).

Plaintiff has sustained its burden of proof. The creation of an express warranty herein has evidentiary support in the deposition of W. P. Stubbs, Manager of the Denver Branch of plaintiff company and the testimony of defendant pertaining thereto. Neither mentioned the word "warranty" in the telephonic conversation which created the contract. The deposition of Stubbs regarding that conversation reads in part as follows: "I told him that we had his surplus list, and we would purchase the 2,000 pounds of Yellow Globe Danvers onion seed at \$2.50, which he quoted in the list as \$3.00 per pound. He accepted the order for the 2,000 pounds of Yellow Globe Danvers onion seed and stated that he would ship the same promptly. We purchased several other items from him at the same time, and I talked to him concerning those. I told him at the time that we only wanted first class quality stocks of high germination and true to type, and he assured me that the stocks were of first class quality and of high germination." Defendant stated in his oral testimony, "I do not

recall any of that conversation. As I remember I would say probably 95% of it was devoted to jockeying between the price of \$3.00 and \$2.00 a pound." Page 24-25 of transcript. Mr. Stubbs' statement that plaintiff wanted only seed of first class quality and true to type and the apparent assurance by defendant that the seed was of the type ordered is not denied and I find that an express warranty was made that the onion seed would be of the variety ordered, and the warranty was not dispelled by the printed non-warranty clauses which appeared on the letterheads and surplus list.

It was contended by the defendants that the warranty was nullified by the existence of a custom that seed growers and distributors of seed did not warrant as to description, productivity, etc. But the evidence presented supported the contention only insofar as productivity was concerned and did not support the contention that there was a custom that variety was not warranted, and in fact one of defendant's experts testified that variety was a factor that could be controlled and known.<sup>1</sup> Therefore the rationale which would be the basis of the custom was lacking.

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<sup>1</sup>On cross-examination defendant's witness, James William Hamilton, was asked the following question and gave the following answer relevant to a non-warranty clause, "Only one question, Mr. Hamilton: I understand that the clause was used to protect the seedsmen from erratic growth in production. By that you don't mean variety of seed? A. That would not be variety. That would be a condition that we could not control. Variety is something that is established." Page 57, Transcript.

It must be remembered that defendant was the grower of the seeds in question and in a position to be certain of the variety. A greater burden should be placed upon the grower who is also the seller of the seed. See 168 A.L.R. at page 586.

There was a breach of contract by defendant and he is liable for the damages as a result thereof. A warranty promises indemnity against defects in the article sold. Regarding damages sought by plaintiff for loss of good will and business, the evidence introduced to support this claim for damages was insufficient to justify the granting of damages for this alleged loss to plaintiff. That claim is too speculative to be a foreseeable consequence of defendant's breach of warranty. Remote or speculative damages not reasonably within the contemplation of the parties are not recoverable. *Calif. Press Mfg. Co. v. Stafford Packing Co.*, 192 Cal. 479. Furthermore, to be recoverable damages for breach of warranty must be certain or capable of being ascertained with a reasonable degree of certainty and not, as here, uncertain in amount.

The Uniform Sales Act, which has been incorporated into the statutes of both California and Colorado, provides that for a breach of warranty, the measure of damages shall be “\* \* \* the loss attributable directly and naturally resulting in the ordinary course of events from the breach.” 1 U.L.A. 69(6). The Act further provides that nothing therein affects the right of the buyer to recover special damages in any case where, by law, such are recoverable. U.S.A. 70.

Plaintiff and defendant had had prior business

dealings and defendant knew that plaintiff was in the seed merchandising business and consequently that there was every likelihood that the onion seed sold plaintiff would be resold by it. The seller's knowledge that the buyer is a dealer in the kind of goods purchased is sufficient to impute knowledge to the seller that the goods are purchased for resale. *Northwest Auto Co. v. Harmon*, 250 F. 832; *Johnson v. Hislop*, 272 Fed. 913, 9th Cir. When plaintiff resold some of the onion seed the act was foreseeable as a natural consequence of the contract between plaintiff and defendant. If the seller has notice from any source that the purchaser purchases for resale, the right to recover special damages which result from buyer's inability to reason of the seller's breach of the principal sale contract to perform arises since the resale may fairly be said to be within the contemplation of the parties at the time of the making of the principal contract. *Calif. Press Mfg. Co. v. Stafford Packing Co.*, 192 Cal. 479. In such cases where a similar warranty is given on resale as was contained in the original agreement and the original purchaser is successfully sued for breach of warranty, the original seller is liable for the damages thus liquidated to his purchaser, and this includes attorney's fees necessitated in defense of the suit for breach of warranty, especially where the original seller was notified by the buyer to assist in the defense of the action. *Robert A. Reichard, Inc., v. Ezl. Dunwoody Co.*, 45 F. Supp. 154. (See also *Grupe v. Glick*, 26 Cal. 2d 680. *Int. State Bank*

of *Trinidad v. Trinidad Bean & Elevator Co.*, 79 Colo. 286, 245 Pac. 489, 25 C.J.S. Sec. 50c). And see 46 Am. Jur. 820. The rule is applied where seed is purchased by a dealer with warranty as to kind and resold by him with a like warranty. *Buckbee v. P. Hohenodel, Jr.*, 224 Fed 14; *Passinger v. Thornburn*, 34 N.Y. 634. The facts of this case justify the application of this rule.

It is therefore ordered that judgment be entered in favor of plaintiff in the sum of \$5006.26, the sum paid by plaintiffs as a result of the judgment against it in the United States District Court, District of Colorado, with interest from the date of judgment, \$8,402.59 attorneys' fees incurred therein, plus interest from the date of payment, and for costs herein.

Plaintiff to prepare findings of fact in accordance with the local rule.

Dated: May 10th, 1950.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed May 10, 1950.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled court, without a jury,



a jury having been waived, on the 22nd day of September, 1949, having been duly and regularly continued until that date, plaintiff appearing by its attorneys, Huffman, Sutliff & Rogers, and Mull & Pierce, and the defendant appearing by his attorney, James I. Harkins, Esq., and evidence both oral and documentary having been introduced and the cause argued and submitted for the decision of the court and the court being fully advised, now makes and files his findings of fact and conclusions of law, to wit:

### Findings of Fact

#### I.

That it is true that the plaintiff is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Colorado; that the defendant is an individual doing business under the style and trade name of Standard Seed Farms Company, with his residence and main business headquarters located at Stockton, California.

#### II.

That it is true that "Yellow Globe Danvers" is now and at all times hereinafter mentioned was a particular variety or type of onion, well known to, and catalogued, grown, cultivated, harvested, stored, bought and sold by, the garden seed trade, industry and onion growers throughout the United States; "Yellow Globe Danvers" onion is uniformly and generally recognized by the seed trade, industry and onion growers and experts as a variety or special type of onion, possessing and generally

known for certain qualities and characteristics. That it is impossible by examination, inspection or otherwise to recognize or identify the variety or type of any onion from the seed thereof. The variety and type can be determined only from the sets of mature onions after the seed is planted and grown. Accordingly, a buyer of onion seed must depend and rely upon the sellers' designation, description and representation of the variety or type of the onion seed sold.

### III.

That it is true that some time prior to October 20, 1943, defendant by a statement in writing solicited plaintiff to purchase of and from defendant various quantities and varieties of onion seed, including a quantity of a variety known as "Yellow Globe Danvers." That thereafter and on or about the 20th day of October, 1943, plaintiff offered to purchase a specific quantity of "Yellow Globe Danvers" onion seed, to wit: approximately 2,000 pounds, at and for the purchase price of Two and 50/100th Dollars (\$2.50) per pound; provided, however, that said plaintiff stipulated as a condition to said purchase that said plaintiff would accept only first class quality stocks of high germination and true to type; that on or about said date defendant accepted said offer and agreed to sell to plaintiff said quantity of onion seed of said variety known as "Yellow Globe Danvers" at and for said purchase price F.O.B. Stockton, California, and to deliver the same to Denver, Colorado; that said agreement was confirmed in writing; that as a part of said agreement defendant expressly warranted,

represented and agreed that said onion seed and all of it was in fact "Yellow Globe Danvers"; that on or about October 28, 1943, defendant delivered to plaintiff at Denver, Colorado, Two Thousand and Five (2005) pounds of onion seed tagged, labeled, billed, described and otherwise represented as "Yellow Globe Danvers" onion seed; that said onion seed was delivered by defendant with sight draft attached to the bill of lading; that relying upon said offer and said bill, description, warranty and representation by defendant that said onion seed was "Yellow Globe Danvers" onion seed, plaintiff accepted such delivery and thereupon honored said draft at the First National Bank at Denver, Colorado, and paid defendant Five Thousand Twenty-nine and 30/100ths Dollars (\$5,029.30) for said seed.

#### IV.

That it is true that plaintiff was unable to identify the variety or type of said onion seed by examination, or otherwise, and relying upon defendant's said warranty, designations and representations aforesaid and believing in good faith said onion seed to be "Yellow Globe Danvers" onion seed, plaintiff resold approximately two thousand (2000) pounds thereof, one thousand (1000) pounds thereof being resold and delivered to Dutch Valley Growers, Inc., an onion set cooperative growers' marketing association incorporated under the laws of the State of Illinois, on or about November 19, 1943, as "Yellow Globe Danvers" onion seed; that said Dutch Valley Growers, its members and cus-

tomers, planted, or caused to be planted, cultivated and matured into sets said seed, after which it complained to plaintiff that said sets shrivelled, sprouted, decayed, kept poorly and did not have the typical characteristics, shape or fine and desirable qualities of "Yellow Globe Danvers" onion, and in fact was not "Yellow Globe Danvers" onion or onion set. That plaintiff promptly advised defendant of said complaints and requested defendant to inspect said onion sets grown from seed so sold by defendant and verify said complaints, which defendant failed or refused to do; that thereafter said Dutch Valley Growers sued plaintiff in the United States District Court for the District of Colorado, being Civil Action No. 1405 demanding judgment for Thirty-four Thousand Three Hundred Eighty-seven and 28/100ths Dollars (\$34,387.28) and costs, because of said defendant's false sale of said onion seed and the loss of crops therefrom; that plaintiff requested defendant to appear and defend said case, which defendant failed or refused to do; that plaintiff was required to and did defend said suit, which necessitated taking numerous depositions in California, Illinois, Washington, D. C., and elsewhere, consumed one week in court trial before court and jury and caused plaintiff to expend Seven Thousand Four Hundred Two and 59/100ths Dollars (\$7,402.59) for attorneys' fees, court costs, traveling and other legal expenses, and plaintiff owes and has promised to pay an additional One Thousand Dollars (\$1,000.00) attorneys' fees; that said litigation extended over a period of approximately three years; that the jury

in said case brought in a verdict for said Dutch Valley Growers and against this plaintiff, sustaining the complaints and allegations of said Dutch Valley Growers and judgment was rendered against this plaintiff for Four Thousand Six Hundred Eighty-four and No/100ths Dollars (\$4,684.00) plus costs of Three Hundred Twenty-two and 26/100ths Dollars (\$322.26); that plaintiff gave defendant an opportunity to pay said judgment or appeal same, which defendant failed or refused to do; fearing that a new trial, if granted, or an appeal would result in a larger judgment against plaintiff, plaintiff paid said judgment and costs. That at all times herein and in said complaint mentioned plaintiff was in the seed merchandising business and defendant knew that to be the fact; that the onion seeds purchased by plaintiff from defendant were purchased for resale to farmers for use in growing a crop of onions and onion sets and at all times herein and in said complaint mentioned defendant knew that to be the fact; that said onion seed when resold as hereinabove set forth were sold with the warranty description and representations regarding said onion seed which had been made by defendant to plaintiff repeated by plaintiff to said purchasers from plaintiff, and at all times herein and in said complaint mentioned defendant knew that such warranty, description and representation would be so made by plaintiff.

#### V.

That it is true that plaintiff has paid Seven Thousand Four Hundred Two and 59/100ths Dollars (\$7,402.59) for attorneys' fees and legal ex-

penses, and plaintiff owes and has promised to pay an additional One Thousand Dollars (\$1,000.00) attorneys' fee in the defense of said Dutch Valley Growers case, which fee and expenses are and each of them is reasonable and fair.

## VI.

That it is not true that the representations, description and warranty, or any of them, made by defendant as aforesaid were wanton or reckless, or that they were calculated to or did cause plaintiff to suffer a substantial loss of good will or to sustain injury to its reputation with its customers, or the seed trade, or industry generally, in the sum of Ten Thousand Dollars (\$10,000.00) or any other sum; but it is true that the representations, description and warranty were untrue in this that said onion seed and each and all of it sold and purchased as aforesaid was not "Yellow Globe Danvers" but was another inferior variety and it is also true that plaintiff has been damaged in the respects as hereinabove and hereinafter set forth in these findings.

## VII.

That it is true that the United States of America by and through its United States Attorney for the Northern District of California, did on the 26th day of June, 1946, file an information against defendant herein, in Case No. 9701 in the District Court of the United States for the Northern District of California, charging this defendant with falsely labelling and advertising, within the mean-

ing of the Federal Seed Act of 1939, the two thousand five (2005) pounds of seed involved herein, in that said seed was designated as "Yellow Globe Danvers" onion seed; that thereafter said court assessed a fine against defendant herein for such false labelling and advertising that defendant did pay the fine so assessed.

### VIII.

That it is true that although plaintiff has demanded of defendant that he reimburse it for the payment of said judgment and costs in said Dutch Valley Growers case, pay the attorneys' fee and legal expenses incident to the defense thereof, pay it for the loss of good will, damage to its reputation and incidental detriments, defendant fails and refuses to do so.

### IX.

That it is not true that at all times in said complaint mentioned or at any of the times therein mentioned there was a custom or usage of the seed trade in the State of California or throughout the United States or elsewhere or at all or among persons purchasing seed or of defendant in selling seed, that the seller of seeds gives no warranty as to variety and/or description, but it is true that at all times in said complaint mentioned variety and description of onion seed can be controlled and is known by growers and sellers of seed generally and there is no custom or usage of the seed trade or of defendant disclaiming warranty of variety or description.

As Conclusions of Law from the Foregoing Facts the Court Finds:

That plaintiff is entitled to judgment:

(1) For the sum of Five Thousand Six and 26/100th Dollars (\$5,006.26) being the amount of the judgment paid in said action in the United States District Court for the District of Colorado, together with interest at the rate of seven per cent (7%) per annum from the 15th day of June, 1948 (being the date of said judgment), in the sum of Six Hundred Eighty-seven and 16/100ths Dollars (\$687.16).

(2) For the further sum of Seven Thousand Four Hundred Two and 59/100ths Dollars (\$7,402.59) being the fair and reasonable attorneys' fees and expenses heretofore paid by plaintiff in said action in the United States District Court, District of Colorado, with interest on the following portions thereof at the rate of seven per cent (7%) per annum from the following dates and in the amounts respectively:

Principal Amount Paid	Date Paid	Interest to June 1, 1950 @ 7%
\$ 250.00.....	5-21-45	\$ 87.95
750.00.....	1- 3-46	231.72
600.00.....	5- 6-46	172.25
1,000.00.....	10-25-47	181.95
1,000.00.....	11-24-48	106.31
500.00.....	3-24-48	76.54
500.00.....	4-16-48	74.42
1,250.00.....	6- 5-48	174.01
1,552.59.....	6- 2-48	217.10
Total Interest.....		\$1,322.25



(3) For the further sum of One Thousand Dollars (\$1,000.00) being the fair and reasonable attorneys' fees which are unpaid but which plaintiff is obligated to pay in said action in the United States District Court, District of Colorado; without interest.

(4) For plaintiff's costs of suit incurred herein. Let judgment be entered accordingly.

Dated: June 14th, 1950.

/s/ DAL M. LEMMON,  
Judge of the United States  
District Court.

Affidavit of Service by Mail attached.

Lodged May 24, 1950.

[Endorsed]: Filed June 14, 1950.

In the District Court of the United States, in and  
for the Northern District of California, North-  
ern Division

No. 6067

THE BARTELDES SEED COMPANY, a Cor-  
poration,

Plaintiff,

vs.

H. L. JONES, Individually and Doing Business  
Under the Style and Trade Name of STAND-  
ARD SEED FARMS COMPANY,

Defendant.

### JUDGMENT

The above-entitled action came on regularly for trial before the above-entitled court, without a jury, a jury having been waived, on the 22nd day of September, 1949, having been duly and regularly continued until that date, plaintiff appearing by its attorneys, Huffman, Sutliff & Rogers, and Mull & Pierce, and the defendant appearing by his attorney, James I. Harkins, Esq., and evidence both oral and documentary having been introduced and the cause argued and submitted for the decision of the court, and the court having heretofore made and filed its findings of fact and conclusions of law, and good cause appearing therefore;

It Is Hereby Ordered, Adjudged and Decreed:

(1) That the plaintiff do have and recover judgment from the defendant in the sum of Five Thousand Six and 26/100ths Dollars (\$5,006.26) together

with interest at the rate of Seven per cent (7%) per annum from the 15th day of June, 1948, in the sum of Six Hundred Eighty-seven and 16/100ths Dollars (\$687.16) or a total of principal and interest in the sum of Five Thousand Six Hundred Ninety-three and 42/100ths Dollars (\$5,693.42).

(2) That the plaintiff do have and recover judgment from the defendant in the further sum of Seven Thousand Four Hundred Two and 59/100ths Dollars (\$7,402.59) with interest on the following portions thereof at the rate of Seven per cent (7%) per annum from the following dates and in the amounts respectively:

Principal Amount		Interest to June 1,
Paid	Date Paid	1950 @ 7%
\$ 250.00.....	5-21-45	\$ 87.95
750.00.....	1- 3-46	231.72
600.00.....	5- 6-46	172.25
1,000.00.....	10-25-47	181.95
1,000.00.....	11-24-48	106.31
500.00.....	3-24-48	76.54
500.00.....	4-16-48	74.42
1,250.00.....	6- 5-48	174.01
1,552.59.....	6- 2-48	217.10
		<hr/>
	Total Interest.....	\$1,322.25

or a total of principle and interest in the sum of Eight Thousand Seven Hundred Twenty-four and 84/100ths Dollars (\$8,724.84);

(3) That the plaintiff do have and recover judgment from the defendant in the further sum of One Thousand Dollars (\$1,000.00) without interest.

(4) That the plaintiff do have and recover judgment from the defendant for its costs of suit incurred herein hereby taxed in the sum of One Hun-

dred Ninety-three and 70/100ths Dollars (\$193.70).

Dated: June 14, 1950.

/s/ DAL M. LEMMON,

Judge, United States District  
Court.

Lodged May 26, 1950.

[Endorsed]: Filed June 14, 1950.

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[Title of District Court and Cause.]

### NOTICE OF ENTRY OF JUDGMENT

To Defendant Above Named and to James I. Harkins, Esq., His Attorney:

You and Each of You Will Please Take Notice that judgment in the above-entitled action in favor of plaintiff and against defendant in the sum of Fifteen Thousand Four Hundred Eighteen and 26/100ths Dollars (\$15,418.26) together with costs of suit herein was entered Wednesday, June 14, 1950.

Dated: June 21, 1950.

MULL & PIERCE,

By /s/ F. R. PIERCE,

HUFFMAN, ROGERS, &  
SUTLIFF,

/s/ KENAZ HUFFMAN, Esq.,

By /s/ F. R. PIERCE,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 22, 1950.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS AND FOR  
ADDITIONAL FINDINGS TO BE MADE

Now comes the defendant and through his attorneys of record moves this Honorable Court to amend the findings and for additional findings to be made in the above-entitled cause:

1. The finding of fact as set forth in paragraph III in the above-entitled action, be amended to show that the quantity of onion seed purchased was to be delivered f.o.b. Stockton, California, and also to show the fact that there was no relationship between the purchase price and f.o.b. shipment of the goods.

2. Referring to Paragraph III, it is hereby requested that the additional findings of fact be made that a non-warranty clause containing the following words:

“Standard Seed Farms Company Gives No Warranty, Express or Implied as to Description, Purity, Productiveness or Any Other Matter of Any Seeds They Send Out and They Will Not in Any Way Be Responsible for Any Crop,”

was plainly printed at the top of the surplus list.

3. Referring to paragraph III, it is requested that the additional findings of fact be made that the manner of payment being made by sight draft

with bill of lading attached was done for the sole reason of security for purchase price.

4. Referring to paragraph VII, it is hereby requested that all matters of findings and fact set forth therein be stricken from the record.

5. It is hereby requested that a new and additional findings of fact be set forth stating that the contract was made in Stockton, California, and was performed in Stockton, California.

Wherefore, Defendant prays that the Court will amend the findings of fact and that additional findings of fact be made.

/s/ JAMES I. HARKINS,

/s/ ALBERT E. CRONIN, JR.,  
Attorneys for Defendant.

#### Points and Authorities

Rules 52 and 52 (A) Federal Rules of Civil Procedure.

[Endorsed]: Filed June 26, 1950.

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[Title of District Court and Cause.]

#### MOTION FOR NEW TRIAL

Now comes the defendant and through his attorneys of record moves this Honorable Court for a new trial in the above-entitled cause, and for reasons states as follows:

1. The judgment was contrary to law.

2. The judgment was contrary to the evidence.

3. The judgment was contrary to the weight of the evidence.

4. For such other and further reasons as may be presented at the hearing of this motion.

Wherefore, defendant prays that the Court grant a new trial.

/s/ JAMES I. HARKINS,

/s/ ALBERT E. CRONIN, JR.,  
Attorneys for Defendant.

Points and Authorities

Rule 59 of the Federal Rule of Civil Procedure.

[Endorsed]: Filed June 26, 1950.

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[Title of District Court and Cause.]

### ORDER

Defendant's motion to amend findings is granted as to specification number IV and finding VII is stricken. Defendant's motion to amend findings in all other respects is denied.

Defendant's motion for a new trial is denied.

Dated: July 24, 1950.

/s/ DAL M. LEMMON,  
United States District Judge.

[Endorsed]: Filed July 24, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given this 15th day of August, 1950, that H. L. Jones, said defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 14th day of June, 1950, in favor of plaintiff against said defendant.

/s/ JAMES I. HARKINS,

/s/ ALBERT E. CRONIN, JR.,

Attorneys for Defendant,

H. L. Jones, etc.

[Endorsed]: Filed August 21, 1950.

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In the District Court of the United States for the  
Northern District of California, Northern  
Division

No. 6067

BARTELDES SEED COMPANY, a Corporation,  
Plaintiff,

vs.

H. L. JONES, Individually and Doing Business  
Under the Firm Name and Style of STAND-  
ARD SEED FARMS COMPANY,

Defendant.

Before: Hon. Dal M. Lemmon,  
Judge.



REPORTER'S TRANSCRIPT

Thursday, September 22, 1949

Appearances:

For the Plaintiff:

RANGER ROGERS, Esq., and

FRED R. PIERCE, Esq.

For the Defendant:

JAMES I. HARKINS, Esq., and

ALBERT E. CRONIN, JR., Esq.

(The deposition of W. P. Stubbs was read, Mr. Pierce reading the questions and Mr. Rogers reading the answers, as follows:)

DEPOSITION OF W. P. STUBBS

"Q. State your name and residence address.

"A. W. P. Stubbs, 1580 St. Paul Street, Apartment 1, Denver, Colorado.

"Q. What is your business address?

"A. Barteldes Seed Company, 1521 - 15th Street, Denver, Colorado.

"Q. What is your position?

"A. Manager of Barteldes Seed Company, Denver branch.

"Q. How long have you held that position?

"A. It will be 25 years in September.

"Q. How long have you been associated with the Barteldes Seed Company of Denver, Colorado?

"A. About 25 years.

(Deposition of W. P. Stubbs.)

“Q. Generally, what are your duties?

“A. To buy and sell seeds and merchandise pertaining to the seed business and other duties that a manager performs.

“Q. Is one of your duties to manage the garden seed business of The Barteldes Seed Company in Denver, Colorado?      A. Yes.

“Q. What does this entail?

“A. Buying and selling of seeds and other merchandise, and supervising of the general business.

“Q. Do you buy and sell garden seeds?

“A. Yes.

“Q. For how many years have you been occupied with such functions?

“A. About twenty-five years.

“Q. Do you recall the purchase of about 2,000 pounds of Yellow Globe Danvers onion seed from Standard Seed Farms Company of Stockton, California, in late October of 1943?      A. Yes.

“Q. How did this transaction come about?

“A. We received a surplus list from the Standard Seed Farms Company of Stockton, California, and among the different seeds they offered was 2,000 pounds of Yellow Globe Danvers onion seed, and I called Mr. H. L. Jones, the manager of Standard Seed Farms Company, over the telephone, and purchased from him 2,000 pounds of Yellow Globe Danvers onion seed at \$2.50 per pound.

“Q. Did you receive a price list?      A. Yes.

“Q. Describe this price list.

(Deposition of W. P. Stubbs.)

“A. Well, it quoted numerous items which they offered, subject to being unsold, which included 2,000 pounds of Yellow Globe Danvers onion seed.

“Q. Was it a surplus list?           A. Yes.

“Q. Do you have it with you?       A. Yes.

“Q. Will you hand it to the Notary Public, please?       A. I will.

“Notary Public is requested to mark the Exhibit for identification, and it was marked Plaintiff's Number 4.

“Q. After you received this list, what did you do?

“A. I called Mr. H. L. Jones over the telephone and purchased 2,000 pounds of Yellow Globe Danvers onion seed from him at \$2.50 per pound, for prompt shipment.

“Q. Did you communicate with Standard Seed Farms Company?       A. Yes.

“Q. About when?           A. October 20th, 1943.

“Q. Would you place the date as being within a few days after receiving the list?

“A. Yes, on October 20th, immediately on receipt of the list.

“Q. How did you communicate?

“A. By telephone.

“Q. To whom did you talk?

“A. Mr. H. L. Jones, Manager of the Standard Seed Farms Company.

“Q. State fully what you said and what he said, if you can.

“A. I told him that we had his surplus list, and we would purchase the 2,000 pounds of Yellow Globe

(Deposition of W. P. Stubbs.)

Danvers onion seed, at \$2.50, which he quoted in the list at \$3.00 per pound. He accepted the order for the 2,000 pounds of Yellow Globe Danvers onion seed and stated that he would ship same promptly. We purchased several other items from him at the same time, and I talked to him concerning those. I told him at the time that we only wanted first-class quality stocks of high germination and true to type, and he assured me that the stocks were of first-class quality and of high germination.

“Q. If you can't remember exactly what was said, tell us the substance of the conversation.

“A. I have answered this in the preceding answer.

“Q. Is there anything else that was said by either of you that you have not mentioned above?

“A. Nothing I can recall at the moment.

“Q. Was there anything said about limitation of liability?           A. No.

“Q. Was there anything said about non-warranty?           A. No.

“Q. Was there anything said about the possibility of the seed not being Yellow Globe Danvers?

“A. No.

“Q. What did you do next in regard to this sale?

“A. I confirmed the purchase by telegram, I believe on the same day, and the telegram was incorporated in the letter confirming the purchase.

“Q. Did you confirm the purchase of the Yellow Globe Danvers onion seed by telegram?

“A. Yes.

(Deposition of W. P. Stubbs.)

“Q. By letter? A. Yes.

“Q. What was the date of the telegram?

“A. I believe it was October the 20th, 1943.

“Q. What was the date of the letter?

“A. That was October the 21st, 1943.

“Q. Was the seed delivered to your company?

“A. Yes.

“Q. About when was it delivered?

“A. About October 28th, 1943.

“Q. How was it paid for?

“A. By our check drawn on the Colorado National Bank of Denver, Colorado.

“Q. Where was it paid for? That is, in what city?

“A. At the First National Bank in Denver, Colorado.

“Q. When did you receive the bill of lading?

“A. We received the bill of lading at the time the draft was paid on October 28th, 1943.

“Q. Was a draft used? A. Yes.

“Q. What kind of draft?

“A. Arrival draft.

“Q. What do you mean by an arrival draft?

“A. It is a draft payable on arrival of the merchandise.

“Q. Now, with reference to the time of payment of the draft, when did you receive the seed?

“A. The seed came in about the same time; I think it was October the 28th, 1943, to the best of my knowledge and belief.

(Deposition of W. P. Stubbs.)

“Q. In other words, the seed was shipped C.O.D.?      A. Yes.

“Q. Was the seed paid for after it had been hauled to Denver?      A. Yes.

“Q. Did you sell a portion of this seed to Dutch Valley Growers, Inc., of South Holland, Illinois?

“A. Yes.

“Q. How much did you sell?

“A. 1,000 pounds to Dutch Valley Growers, Inc., of South Holland, Illinois.

“Q. Did you ship the seed?

“A. Yes, the 1,000 pounds.

“Q. When did you ship the seed?

“A. Shipped during November, 1943, some time; I don't remember the exact date.

“Q. What seed did you ship?

“A. 1,000 pounds of the Yellow Globe Danvers onion seed received from Standard Seed Farms Company.

“Q. Did you ship the seed that you had received from Standard Seed Farms Company?

“A. Yes.

“Q. Did Dutch Valley Growers, Inc., pay you?

“A. Yes.

“Q. What was the result of this sale?

“A. The Dutch Valley Growers, Inc., complained to us some time after the sets were harvested and stored in the warehouse that the sets had started to sprout and were not keeping satisfactorily. They requested us to send someone to South Holland to inspect the sets grown from the seed which we

(Deposition of W. P. Stubbs.)

shipped them and which we purchased from the Standard Seed Farms Company. We then took the matter up with Mr. H. L. Jones, manager of the Standard Seed Farms Company, and advised them of the complaint and requested them to send someone qualified to inspect the sets. However, the Standard Seed Farms Company ignored the request and did not make any attempt to inspect the sets.

“Q. Was claim made against you?”

“A. Yes.

“Q. What was the claim?”

“A. They claimed that the Yellow Globe Danvers onion seeds we shipped them were evidently not Yellow Globe Danvers but some other variety which did not keep in storage and were badly sprouted. They also claimed that the sets grown from seed we shipped them as Yellow Globe Danvers onion seed were stored along with other sets of Yellow Globe Danvers onion seed purchased from other sources, and that the other Yellow Globe Danvers onion seed purchased from the other sources were keeping satisfactorily.

“Q. What did you do?”

“A. We tried to see if Dutch Valley would make a reasonable compromise, but they refused to do so.

“Q. Did you invite Standard Seed Farms Company to do anything?           A. Yes.

“Q. Did you invite H. L. Jones to do anything?”

“A. Yes.

“Q. Did you attempt to settle the claim of Dutch Valley Growers, Inc.?           A. Yes.

(Deposition of W. P. Stubbs.)

“Q. Were you able to settle the claim of Dutch Valley Growers, Inc.?      A. No.

“Q. How much did they demand of you approximately?      A. Approximately \$35,000.

“Q. Did you ask H. L. Jones of Stockton, California, to settle this claim?      A. Yes.

“Q. Did he do it?      A. No.

“Q. Was a lawsuit filed against your company?

“A. Yes.

“Q. Do you know the number of this case?

“A. 1405.

“Q. What court was it in?

“A. In the United States District Court for the District of Colorado.

“Q. What was done after the lawsuit was filed?

“A. We still tried to make a reasonable settlement.

“Q. Was attempted settlement made?

“A. No.

“Q. Who defended the case?

“A. Huffman, Sutliff and Rogers.

“Q. Did H. L. Jones defend the case?

“A. No.

“Q. Did he participate in the defense of the case?      A. No.

“Q. Was he asked to participate in the defense of the case?      A. Yes.

“Q. Were you forced to employ attorneys to defend this litigation?      A. Yes.

“Q. Whom did you employ?

“A. Huffman, Sutliff and Rogers.



(Deposition of W. P. Stubbs.)

“Q. What were your instructions to them?

“A. To handle the suit and defend it for Barteldes Seed Company.

“Q. Did you confer with the officers of your company in regard to his?      A. Yes.

“Q. Did this meet with their approval?

“A. Yes.

“Q. Was this case defended?      A. Yes.

“Q. By whom?

“A. Huffman, Sutliff and Rogers.

“Q. With what result?

“A. We lost the case.

“Q. Was a verdict and judgment rendered against you?      A. Yes.

“Q. Approximately what was the sum of the judgment?      A. \$4,684.00.

“Q. What were the court costs?

“A. \$322.26.

“Q. Did you pay these sums?      A. Yes.

“Q. In addition to paying the judgment in the sum above referred to, were court costs and expenses involved in this matter?      A. Yes.

“Q. How much were the court costs?

“A. \$322.26.

“Q. How much were the expenses?

“A. \$1,552.59.

“Q. I hand you herewith a document purporting to be a statement of attorney's fees and costs paid by your company in the matter of Dutch Valley Growers, Inc., vs. The Barteldes Seed Company, Civil Action No. 1405, United States District Court,

(Deposition of W. P. Stubbs.)

Denver, Colorado, and ask you if this refreshes your recollection?      A. Yes.

“Q. Can you now state the total sum of expenses that you have now paid in the defense of said Civil Action No. 1405?

“A. The total sum of expenses paid in defense of Action No. 1405 are as follows: Judgment, \$4,684.00; Court cost, \$322.26; Expenses, \$1,552.59; Attorneys’ fees, \$5,850.00; Grand total, \$12,408.85.

“Q. How much were the attorneys’ fees that you paid in this matter?      A. \$5,850.00.

“Q. Do you regard these as reasonable?

“A. Yes.

“Q. As necessary?      A. Yes.”

Mr. Rogers: If the Court please, I would like to offer in evidence at this time the surplus list identified by the witness whose deposition I just read.

Thursday, September 22, 1949—2:00 o’Clock P.M.

Mr. Rogers: The plaintiff’s next witness, if the Court please, is Mr. Armin Barteldes of Barteldes Seed Company, Denver, Colorado.

### ARMIN BARTELDES

called for the Plaintiff, sworn.

### Direct Examination

By Mr. Rogers:

Q. Please state your name and address.

A. Armin Barteldes, 5650 West Thirty-eighth Avenue, Denver, Colorado.

(Testimony of Armin Barteldes.)

Q. What is your occupation, Mr. Barteldes?

A. I am in the seed business.

Q. What seed house?

A. Barteldes Seed Company.

Q. What is your position there?

A. Assistant Manager.

Q. In Denver? A. In Denver.

Q. Mr. Barteldes, how long have you been in the seed business?

A. Oh, all my life I have been working in it, about twenty-eight years.

Q. Was your father a seed man?

A. Yes.

Q. Of the Barteldes Seed Company?

A. Yes, sir.

Q. And your uncle?

A. My uncle originated it.

Q. How long has the Barteldes Seed Company been in business in Denver and Lawrence, Kansas?

A. In Lawrence about 82 years; in Denver about 65 years.

Q. Mr. Barteldes, what are your duties in your position in Barteldes Seed Company?

A. Working out some of the seed sales and also the onion sets.

Q. Mr. Barteldes, are you familiar with a variety known as the Yellow Globe Danvers?

A. Yes.

Q. In general, what is the Yellow Globe Danvers?

(Testimony of Armin Barteldes.)

A. It is an old standard variety of a light brown color, globe in shape.

Q. It is a type of onion?

A. Yes, definitely a type of onion, variety of onion.

Q. Is it known in the seed trade by that name?

A. Yes, sir.

Q. Mr. Barteldes, do you recall the purchase of 2,000 pounds of Yellow Globe Danvers seeds from Standard Seed Farms Company from Stockton, California, in the fall of 1943?           A. Yes.

Q. Mr. Barteldes, I hand you herewith Plaintiff's Exhibit 4, and ask you to examine it, and ask you if you can state when the seed paid for by that draft was delivered in Denver, calling your attention to the stamps on the back.

A. The draft was paid on October 28, 1943, so the seed would have had to have been delivered at about the same time.

Q. Mr. Barteldes, did you have occasion to have any tests as to the variety of this seed made in the course of your duties at the office in Denver?

A. Yes.

Q. What tests did you have made?

A. I took a sample to one of our onion seed growers in Greeley, and he planted them along with his own varieties of sets as a check.

Q. Do you recall approximately when that was? I can refresh your recollection by the testimony of Mr. Werkheiser.

A. It should have been in 1945.

(Testimony of Armin Barteldes.)

Q. 1945. Do you recall approximately how much seed you took to Mr. Werkheiser?

A. I think I took about ten pounds.

Q. Who is Mr. Werkheiser?

A. He is our onion set grower in Greeley.

Q. And, if you know, what did he do with the seed, and what was the result of the tests?

A. He planted the seed in Greeley, and he harvested them when he harvested other sets. He kept part of them, and he sent part of them down to us.

Q. Were the sets stored?

A. We stored them in our warehouse.

Q. Did you examine these sets in the warehouse?

A. Yes.

Q. During the winter of 1945?           A. Yes.

Q. Will you describe to the court the nature of your examination and the appearance of the sets generally?

A. Well, they were not Yellow Globe Danvers. They were a straw colored onion, and they had kind of green ribs on them. Something we had never grown before, or seen, and they didn't keep very well, they sprouted.

Q. Where did you get these seeds, Mr. Barteldes?

A. I got these seeds from the Standard Seed Farms.

Q. You weren't here this morning; the testimony this morning was that 1000 pounds of the 2000 pounds purchased from the Standard Seed Farms Company was sold to Dutch Valley Growers, Incorporated, of South Holland, Illinois. Do you know what became of the other 1000 pounds?

(Testimony of Armin Barteldes.)

A. Some we sold to Anderson Seed Company at Greeley, and some we sold to Peacock Corporation at Racine, Wisconsin.

Q. Did you have any complaints from either of those purchases?

A. We had complaints from Anderson of Greeley. We weren't paid for the seed by Peacock, we never heard a word from him.

Q. What was the result of the sale of a thousand pounds to Dutch Valley Growers, Inc.?

A. We were sued for \$30,000.

Q. Did you attempt to settle the case?

A. We were hoping to settle it, but didn't get around to it.

Q. As a result of the sale of this seed—I will withdraw that question. Was there any loss of good will as a result of the re-sale of this seed by your company?

A. In the Dutch Valley case——

Mr. Harkins: Just a moment. If the Court please, I object to that question as calling for a conclusion of the witness.

The Court: Well, it presents a legal question that probably you would want to argue on or brief later on. I am going to receive the evidence, and then I will consider it in connection with the legal problems that are finally presented to me.

Mr. Harkins: Thank you, your Honor.

The Court: It may be understood this line of questions are asked subject to the objections made.

(Testimony of Armin Barteldes.)

Mr. Rogers: What was your last answer before the interruption? I will ask the reporter to read it.

The Court: Did you suffer any loss of good will as a result of the purchase of this seed?

A. We have not been able to sell any onion seed or anything else to Dutch Valley.

Q. Where?

A. To the Dutch Valley Company.

Mr. Rogers: Peacock didn't pay you?

A. No.

Q. And Anderson of Greeley you mentioned, have you traded with him over a good many years?

A. Yes, we traded with him, he was quite a good customer of ours, and he kicked about it, but he never brought suit, we were afraid he would, but we have traded with him since.

Q. Mr. Barteldes, can you place any figure that would identify the loss of good will because of this resale, any figure in money of any kind?

A. Well, that would be pretty hard to put.

Q. You know there is a loss of good will, but you cannot identify it in terms of money?

A. That is right.

Q. Thank you, sir. Mr. Barteldes, there was testimony this morning that the Barteldes Seed Company—it is admitted that the Barteldes Seed Company paid \$5,438 attorney's fees as a result of litigation arising out of the sale of this seed. Have you promised to pay any other attorney's fees in connection with the Dutch Valley Growers suit?

(Testimony of Armin Barteldes.)

A. We promised to pay Huffman \$1,000.

Q. Have you paid it?           A. No.

Q. When have you promised to pay it?

A. Any time that suits our convenience.

### Cross-Examination

By Mr. Harkins:

Q. Your position is that of Assistant Manager of Barteldes Seed Company, is that correct?

A. Yes.

Q. Who is the General Manager, Mr. Stubbs?

A. Mr. Stubbs, yes, sir.

Q. Do your duties as Assistant Manager entail the receipt of shipments of seeds ordered from other growers or wholesalers?           A. Do my duties?

Q. Yes.           A. No, sir.

Q. Did you at any time in October of 1943 personally deal with Mr. Jones or Mr. Jones doing business as the Standard Seed Farms?

A. Personally, no, sir.

Q. You had nothing to do personally with the order for 2,000 pounds of onion seed?

A. No, sir.

Q. You aren't familiar with the conversation or the dealing between Mr. Stubbs and Mr. Jones of your own knowledge?

A. Just from hearsay.

Q. Now, you stated that certain tests were made of about ten pounds of onion seed in 1945 that you



(Testimony of Armin Barteldes.)

delivered to Mr. Werkheiser. Where did you get those ten pounds of seed?

A. Right out of the bag that came from Standard Seed Farms.

Q. You say it came right out of the bag that came from Standard Seed Farms. How could you tell it came from the Standard Seed Farms?

A. It had the lot number on it.

Q. Whose lot number?

A. Our lot number.

Q. Did you place that lot number on there?

A. No, sir.

Q. That was placed on there by one of your employees? A. Yes, sir.

Q. So you of your own knowledge don't know if that was delivered by the Standard Seed Farms to the Barteldes?

A. Well, I would swear to it.

Q. What?

A. I would swear to it, the way we keep our records and the books that we enter——

Q. You didn't keep the records yourself or place the lot number on there? A. No, sir.

Q. Do you know whether or not it is the practice of your company when shipments are received from growers or other wholesalers to remove their tags and place your lot numbers on there?

Mr. Rogers: I object to that as incompetent, irrelevant, and immaterial.

The Court: It certainly is material. It has to do with the identification. Overruled.

(Testimony of Armin Barteldes.)

Q. (By Mr. Harkins): Do you wish me to repeat that question, Mr. Barteldes?

A. No. We do, yes, we change the Standard Seed Farm label on a shipment like this thousand pounds that went to Dutch Valley, and put our own label inside the bag and our own tag on it.

Q. What do you do with the growers' or wholesalers' tags that came with the shipment?

A. We keep one in the file, probably, one tag.

Q. There is one inside the bag and one on the outside of the bag, is that correct?

A. Usually, yes.

Q. Now, is it the practice in your company when you assign a lot number to an assignment to keep those shipments separate from other shipments you receive from other growers?

A. Certainly—repeat that, your statement.

Q. Is it the practice in your company when you receive shipments from certain growers to keep those shipments separate?      A. Yes.

Q. (By the Court): How do you identify those, give each a lot number?

A. We give each a lot number.

Q. (By Mr. Harkins): Did you remove the ten pounds from this bag of seed that you sent to Mr. Werkheiser?      A. Yes, sir.

Q. ———or did one of your employees remove it?

A. I did.

Q. Who identified that as the Standard Seed Farms Company shipment?

(Testimony of Armin Barteldes.)

A. The lady that handles our garden seed department took me to the back room there where it was, and I knew what lot it was and I took it out myself.

Q. Did you have anything to do with the transaction with the Dutch Valley Growers in ordering that thousand pounds of onion seed from your company?      A. No, sir.

Q. You had nothing to do with this shipment?

A. No, sir.

Q. Do you know whether those were shipped in the original bags or bags of your own?

A. In the original bags.

Q. How do you know that, Mr. Barteldes?

A. From the testimony of what the boys have told me.

Q. You don't know of your own knowledge?

A. I didn't see them, no, but I know what the bags looked like.

Q. Do you use similar bags to those used by the Standard Seed Farms Company?

A. They were in a seamless bag, but they weren't in the same type of bag as we usually have.

Q. Did you examine all the bags that were shipped to the Dutch Valley Growers?

A. No, sir.

Q. (By the Court): What were the distinguishing characteristics?      A. Of the bags?

Q. Yes.

A. They had a different colored red stripe. We

(Testimony of Armin Barteldes.)

usually use the Fulton bag, that is the manufacturer of a seamless bag, and this was some bag we had never used before, and ordinarily we don't see.

Q. (By Mr. Harkins): Mr. Barteldes, were all of the other thousand pounds of seed sold, other than the thousand pounds sold to the Dutch Valley Growers?  
A. Not all, no.

Q. How much of the remainder of that thousand pounds were sold, do you know, approximately?

A. Well, I would say about 850.

Q. No suits have been filed against your company as to that 850 pounds of seed?

A. No, sir.

Q. How long had you been dealing with Anderson and Company prior to October of 1943?

A. Oh, he moved in there from Nebraska I would say five or six years before that.

Q. Had you sold any onion seed prior to that to him?  
A. I think so.

Q. Do you know whether you did or not?

A. No, I don't.

Q. Did you sell him any other kind of seed?

A. Yes, sir.

Q. Prior to October, 1943?  
A. Yes, sir.

Q. Have you had any dealings with Anderson since October of 1943?  
A. Yes, sir.

Q. The Peacock Corporation, had you dealt with them prior to October of 1943?  
A. Yes, sir.

Q. Have you dealt with them since October of 1943?  
A. No, sir.

(Testimony of Armin Barteldes.)

Q. What had you sold them prior to October, 1943, if you know?

A. Oh, Mr. Stubbs—he sold the onion seed. He purchased other small garden seed.

Q. Those were the only two companies that you have had any complaints from relative to the onion seed?      A. Yes, sir.

Q. Your other business has been the usual up and down, garden or surplus seed, and such as that, since October, 1943?      A. I don't understand.

Q. What has been the trend of your business since October of 1943, has it been average, increased, or decreased?

A. Well, it has been about the same, maybe a little bit better.

Q. Did you ever deal with the Dutch Valley Growers prior to October, 1943?

A. I think we had, yes.

Q. Well, are you sure, or do you know?

A. I don't know. I didn't sell him onion seeds——

Q. That is what I am trying to find out.

A. I haven't dealt with them on the onion seeds. I have dealt with them for some time——

Q. You wouldn't know, Mr. Barteldes, when this seed was ordered from you by the Dutch Valley Growers, whether the seeds were going to be used for sets or what they were going to be used for?

A. No.

Mr. Rogers: If the Court please, that is irrelevant.

(Testimony of Armin Barteldes.)

Q. (By Mr. Harkins): Your testimony is, Mr. Barteldes, you have been in the seed business for at least 20 or 25 years? A. Yes.

Q. You are familiar with the general custom and usage in the seed business throughout the United States?

Mr. Rogers: If the Court please, I wish to strenuously object to this as outside the direct examination.

The Court: Yes, it is outside the direct examination.

Mr. Harkins: That is all, your Honor, unless my associate has a question.

Q. (By Mr. Cronin): Mr. Barteldes, when did you receive the seed from Mr. Jones?

A. When?

Q. Yes. A. Oh, in October, 1943.

Q. And when did you give Mr. Werkheiser the ten pounds to take for a sample?

A. I think that would be in 1945.

Q. That would be two years later?

A. Yes.

Q. Now, about these tags, these identification tags, what are on those tags?

A. The name and the variety and the lot number.

Q. Is there any other printing on those tags? If I showed you a tag, could you identify it?

A. Yes.

(Testimony of Armin Barteldes.)

Q. I hand you what purports to be an identification tag, and ask you to look at it and examine it and see if that is the usual tag that accompanies a shipment of seed?

Mr. Rogers: If the Court please, we are interested in the identification of the variety received by the Barteldes Seed Company. I don't want any misunderstanding to come in by the cross-examination of my witness.

The Court: I don't know what the purpose of this is until the witness answers.

Q. Do you identify that tag?

A. This is a Standard Seed Farms Company tag. It is different from our stock tag that I think you were asking me about.

Q. (By Mr. Cronin): I am asking if these are the type of tag that accompanied all shipments of seed that you purchased from other companies. Do they have that type of tag?      A. No.

Mr. Pierce: Just a moment. I object to that as not proper cross-examination.

The Court: What is the purpose of it?

Mr. Cronin: I wanted to identify that as the usual type of tag on the seed.

Q. (By the Court): Let me ask you, did you see the tags that originally accompanied these seeds?

A. No.

Mr. Cronin: That is all.

Mr. Rogers: No further questions. That is all the testimony we have, your Honor.

I would like to offer in evidence at this time the telegram of October 20th from the Barteldes Seed Company to Standard Seed Farms Company, identified at the pre-trial as Plaintiff's Exhibit for identification.

The Court: Under the stipulation entered into at the pre-trial, it will be received.

(Telegram from the Barteldes Seed Company to Standard Seed Farms Company dated October 20, 1944, was marked Plaintiff's Exhibit Number 5.)

Mr. Rogers: And also Plaintiff's Exhibit for identification Number 6, the letter of October 21 from the Barteldes Seed Company to Standard Seed Farms Company insofar as it is material to the case.

The Court: Received.

(Letter from Barteldes Seed Company to Standard Seed Farms Company dated October 21, 1943, was marked Plaintiff's Exhibit Number 6.)

Mr. Rogers: I should also like to offer in evidence a letter from H. L. Jones of the Standard Seed Farms Company to the Barteldes Seed Company dated October 21, 1943, which has not previously been identified, it had been mislaid. I am going to ask counsel for a stipulation that it may be used without foundation. Otherwise, I will call Mr. Jones to identify it.



Mr. Pierce: Do I understand, your Honor, that all the exhibits at the pre-trial that were stipulated to are now in evidence?

The Court: Well, I will have to look at the pre-trial order.

Mr. Pierce: If they are not in evidence, as a matter of technical record I would like to offer them in evidence at this time and ask that they be appropriately marked.

The Court: If there is no objection, they will all be received.

Mr. Rogers: Do you have objection?

Mr. Harkins: No.

(Document entitled "Contract Price List, Vegetable Seeds, Season of October 18, 1943, Surplus 1943 Crop, Standard Seed Farms Company," was marked Plaintiff's Exhibit Number 7.)

(Stipulation in case of Dutch Valley Growers, Inc., vs. the Barteldes Seed Company, was marked Plaintiff's Exhibit Number 8.)

(Letter from Standard Seed Farms Company to the Barteldes Seed Company dated October 21, 1943, was marked Plaintiff's Exhibit Number 9.)

Mr. Pierce: Your Honor, that is our case, with the exception of a fact that we have been discussing with counsel and which we believe can be covered by a stipulation after the 3:00 o'clock recess, or during the 3:00 o'clock recess. Is that agreeable with you, Mr. Harkins?

Mr. Harkins: That is agreeable.

Mr. Pierce: That will save a lot of time. I think it will be stipulated, so we can reopen our case after the 3:00 o'clock recess for the purpose of putting in a stipulation.

The Court: Very well.

Mr. Harkins: Will you take the stand, Mr. Jones?

### HUGH L. JONES

called for the Defendant, sworn.

### Direct Examination

By Mr. Harkins:

Q. Your full name is Hugh L. Jones?

A. Yes.

Q. And prior to and during October of 1943 and subsequent thereto you operated a business known as the Standard Seed Farms Company?

A. Yes, I did.

Q. Will you state whether that was a corporation, a partnership, or what was the nature of the business set-up?

A. It was an individual doing business under that name.

Q. That is——

A. Myself, doing business under that name.

Q. How long have you been in the seed business, Mr. Jones?

A. Approximately about thirty-two years—thirty years, at least.

(Testimony of Hugh L. Jones.)

Q. And when did you start business as the Standard Seed Farms Company?      A. About 1916.

Q. Prior to 1916, you had been in the seed business work or employment?

A. I worked for another company prior to that for approximately three years.

Q. What kind of work were you doing there?

A. General field work, supervising crops and so forth, pertaining to the raising of vegetable seeds.

Q. And the Standard Seed Farms Company, what type of seed business did they engage in primarily?

A. Primarily vegetable seeds. You might say exclusively vegetable seeds.

Q. Is that growing and selling or growing or selling?

A. The growing as well as the process and sale of vegetable seeds.

Q. Now, in the conduct of this business you dealt with customers both in California and in the various parts of the United States?

A. Very near all states.

Q. How do you solicit your business from the various wholesalers and seed concerns?

A. Sometimes we would make personal calls, on the majority of them that we can do economically. Sometimes we sent out lists of what we have to offer.

Q. When you say "lists" is that price lists or surplus lists?

A. Yes, a price list of what you have on hand and what you wish to dispose of.

(Testimony of Hugh L. Jones.)

Q. Is it similar to the surplus list that was contained in the—well, I will show you a copy of it here, Plaintiff's Exhibit 7, Mr. Jones, and that is the surplus list that was contained in the deposition of Mr. Stubbs.

A. Yes, that is the same list.

Q. Is that the general practice in the seed business, to solicit business by surplus lists or price lists?

A. That is the general practice.

Q. Now, prior to October, 1943, did you—I will show you Plaintiff's Exhibit Number 7 again, with which you are familiar, you mailed that to the Barteldes Seed Company, isn't that correct?

A. Yes.

Q. That is a copy of an original that you mailed out?

A. Yes.

Q. As a result of that did you receive—or, rather, did you have any business dealings with the Barteldes Seed Company?

A. I received a telephone message from Mr. Stubbs of the Barteldes Seed Company on or about October 20th.

Q. And what was the telephone message concerning?

A. It was—after the usual amenities he said he was interested in buying a ton of Yellow Globe Danvers onion seed, some south port Yellow Globe onion seed, also some celery seed, some Ebenezer seed, and some radish seed. That is all I can recall.

Q. And did you enter into any business deal with him at that time?

(Testimony of Hugh L. Jones.)

A. Yes, sir. Mr. Stubbs called my attention to the price we had on Yellow Globe Danvers that was quoted to him as \$3.00 a pound, and he objected to it, stating that he didn't think he would be interested in that price, and after considerable jockeying, you might say, back and forth, he offered \$2.50 a pound for it.

Q. Did you accept that offer?

A. I accepted that offer.

Q. Was there any further conversation with Mr. Stubbs relative to the purchase of onion seed?

A. Yes. He went into detail as to how he wanted it shipped. He notified, or, rather, told me that he wanted it shipped over the P.I.E.—I think that is the Pacific Intermountain Express, a trucking concern. He stated in doing that he wished to avoid getting the shipments mixed up with war shipments which were very heavy at that time, and he wanted shipments very promptly and delivery as promptly as we could possibly get it, and we agreed to deliver it as he directed.

Q. In your telephone conversation with Mr. Stubbs was there any mention made as to the manner of shipment—the manner of payment of the seed in question?

A. I have already stated the manner of shipment, and on the matter of payment, I told Mr. Stubbs that inasmuch as we were making what we thought was a terrific concession in price, that we should have our money as early as possible, and he told me at that time to ship—no, he said he would

(Testimony of Hugh L. Jones.)

air mail a check on it immediately upon the receipt of the invoice, or I could ship it draft.

Q. Was there any discussion as to the payment of freight rates on that shipment?

A. No, there was no discussion in regard to the payment of freight rates, because it is customary that the buyer of garden seeds, since I have been connected with the business, for the buyer to pay the freight from the point of origin. I have never known a shipment otherwise.

Q. Did he state that the shipment could be f.o.b. point of origin, or f.o.b. point of destination in the telephone conversation?

A. Shipment was to be f.o.b. Stockton.

Q. In that telephone conversation you were in Stockton, California, is that correct?

A. Yes.

Q. And he identified himself as being in Denver in the telephone conversation?

A. That is where he wanted it shipped.

Q. I want to refresh your recollection, Mr. Jones,—you were here this morning when Mr. Stubbs' deposition was read—may I have your copy of that? I don't have the answer in full there. In answer to interrogatory number 24, there was read into the record, Mr. Jones, the telephone conversation you had with Mr. Stubbs in answer to the question as to what was said:

“I told him that we had his surplus list, and we would purchase the 2,000 pounds of Yellow Globe Danvers onion seed at \$2.50, which he quoted in the list as \$3.00 per pound. He accepted the order for

(Testimony of Hugh L. Jones.)

the 2,000 pounds of Yellow Globe Danvers onion seed and stated that he would ship the same promptly. We purchased several other items from him at the same time, and I talked to him concerning those. I told him at the time that we only wanted first class quality stocks of high germination and true to type, and he assured me that the stocks were of first class quality and of high germination.”

A. I don't recall any of that conversation. As I remember, I would say probably 95 per cent of it was devoted to jockeying between the price of \$3.00 and \$2.00 a pound.

Q. You didn't pay the freight for the shipment?

A. Oh, no, that is not customary.

Q. The freight was delivered to the Independent Freight Lines Depot at Stockton, California?

A. Yes.

Q. The Pacific Intermountain Express did not have a terminal at Stockton?

A. I inquired from the Stockton office if I could deliver it to his building here, and he said I would have to send it to Sacramento and P.I.E. would have to pick it up near Sacramento or at Sacramento.

Q. So it was delivered by you to the Independent Freight Lines?

A. It was delivered to the Independent Freight Lines.

Q. The 2,000 pounds of onion seeds, Mr. Jones, in what type of bag and what brand of bag was that seed contained?

A. What type of—

(Testimony of Hugh L. Jones.)

Q. What type of shipping bag, will you describe to the Court the type of container?

A. As a rule, that was packed in Cincinnati seamless A two-bushel bags, and they were double bags.

Q. And they are hundred pound bags, or two hundred pounds?

A. They have about a hundred to 102 or 103 pounds a bag.

Q. The 2,000 pounds of onion seeds, where were they grown?

A. They were grown in Stockton, San Joaquin County.

Q. They were grown under your supervision?

A. Yes.

Q. How was that seed brought into your warehouse and sacked and shipped?

A. It is brought into the warehouse after the usual threshing procedure for preliminary treatment, removed from the warehouse, washed, dried, and sacked, and returned to the warehouse for final cleaning and packing in the warehouse, and a label is put on—one part of that label is inside the bag, the other part is outside the bag. Then a lot number is put on that label and the percentage of germination and percentage of purity is put on that label—the amount of germination on that was 90 per cent—that appeared on the bag, and approximately that is all.

Q. Your various types of onion seed, if you are growing more than one type, how are they kept separate in your warehouse?



(Testimony of Hugh L. Jones.)

A. Well, there is an inflexible rule there I never allow more than one type of onion in the warehouse at the same time—that is, in the cleaning department of the warehouse at the same time. That was for the purpose of avoiding mixtures and—well, mixtures.

Q. And do you recall how much tonnage of onion seed that you grew in 1943?

A. In that particular lot, as near as I can recall it, there was something like 3200 pounds.

Q. And was that all Yellow Globe Danvers?

A. That was all Yellow Gobe Danvers.

Q. 2,000 pounds of which were sold to the Barteldes Seed Company?

A. That went on the Barteldes Seed Company order.

Q. And did you dispose of the other thousand pounds?

A. Oh, yes, that was disposed of to various customers.

Q. I am going to show you here, Mr. Jones, a tag, presumably a shipping tag, and ask you if that is the type of shipping tag that was used in your shipments to Barteldes Seed Company in October—on or about October 23, 1943?

Mr. Rogers: If the Court please, I think this is directed not towards the shipping tag, but to some material on the shipping tag. The shipping tag itself I have no objection to, but I can't see the materiality.

(Testimony of Hugh L. Jones.)

The Court: It may be leading up to something.

Mr. Harkins: Yes, it is, your Honor. I have a purpose.

Q. Is that the type of shipping tag that was used in your—

A. That is the type of shipping tag that covered all shipments. One of these tags were attached to each and every bag. The lower half of that tag went into the inside of the bag, the upper half went on the outside of the bag.

Mr. Harkins: I am going to ask that be marked for identification Defendants' Exhibit next in order.

(The document referred to was marked Defendant's Exhibit B for identification.)

Q. (By Mr. Harkins): How was the 2,000 pound shipment of seed to the Barteldes Seed Company paid for, how did they pay for it?

A. They paid our draft, sight draft.

Q. I am going to show you, Mr. Jones, Plaintiff's Exhibit 6, and ask you if that is the letter of confirmation which you received from the Barteldes Seed Company subsequent to your telephone conversation with Mr. Stubbs?

A. That is the letter of confirmation.

Q. Did that follow Plaintiff's Exhibit Number 5, the telegram of confirmation sent to you by Mr. Stubbs of Barteldes Seed Company? A. Yes.

Q. Did you follow the instructions thereon and ship the seed f.o.b. Stockton, California, and send the invoice to the Barteldes Seed Company?

(Testimony of Hugh L. Jones.)

A. I did.

Q. Shipper's order bill-of-lading with the draft drawn on——

A. Shipper's order bill-of-lading with the draft attached.

Q. You had had previous dealings prior to October 20, 1943, had you, with the Barteldes Seed Company?

A. Our first dealings with the Barteldes Seed Company I think dates back to 1918, when the Barteldes Seed Company were buying seed out of Lawrence, Kansas, and it continued intermittently—not very steadily, but intermittently it continued up to the time of this shipment of October 20, 1943.

Q. Why did you use that shipper's order bill-of-lading with the draft attached, Mr. Jones?

A. Well, in discussing this deal, it was a matter of using that money in a hurry, and we wanted security for the payment of the seed we were sending him, it was a large order, something which we didn't wrestle with every day, and we sent it to protect that interest. We sent it through the bank with the shipper's order attached to the draft, which is customary in such circumstances.

Q. Now, you stated you have been in the seed business since 1916, and you are familiar, are you not, Mr. Jones, with the general custom and usage throughout the seed trade in the State of California and in other parts of the United States relative to disclaimer clauses in the sale of seed, are you not?

A. I am.

(Testimony of Hugh L. Jones.)

Q. And isn't it true, Mr. Jones, that there is a general custom in the seed trade in the State of California not to warrant either the description or the quality or the productiveness or any other matters dealing with the sale of seed?

Mr. Pierce: Just a minute, please, before you answer. We object to that question upon the ground first of all it is leading and suggestive, but more particularly on the ground——

The Court: That is far enough. I sustain it on that ground, as leading and suggestive.

Q. (By Mr. Harkins): Mr. Jones, are you familiar with any general custom or usage in the State of California relative to disclaimer clauses or non-warranty clauses in the State of California?

A. Yes.

Mr. Pierce: Just a minute. I object to that question on the ground it is calling for evidence upon a fact not relevant in this case——

The Court: I am going to receive it, Mr. Pierce——

Mr. Pierce: Yes, your Honor.

The Court: Subject to your objection to its relevancy, and I will consider it later on.

Mr. Pierce: And may it be considered all these questions relating to custom and practice in variance with what we claim to be the practice are objected to?

The Court: Very well. I think counsel submitted some authorities with respect to the matter that the Court can take judicial notice of the practice.

(Testimony of Hugh L. Jones.)

Mr. Harkins: I did, your Honor, on our motion to strike.

The Court: I will receive it subject to the objection. All objections to custom are deemed to have been made on the ground of materiality.

Mr. Harkins: You are familiar with the general custom in the seed business in the State of California? A. Yes.

Q. Relative to disclaimer clauses and non-warranty clauses? A. Yes.

Q. Mr. Jones, do you know what that custom is?

The Court: And was during the period of 1943.

Q. (By Mr. Harkins): During the period of 1943; in other words, during the period this sale was made to Barteldes Seed Company of 2,000 pounds of Yellow Globe Danvers.

A. That, I would say, was the universal custom.

Q. What was the custom?

A. That was the universal custom.

Q. (By the Court): What was the custom?

A. The non-warranty of seed you sell.

Mr. Harkins: As to what, Mr. Jones?

A. As to productiveness or any other matter of that seed.

Q. As to quality?

A. As to quality, productiveness—

Mr. Pierce: Please don't—may it please the Court, this witness is testifying as an expert, and I think he knows more about it than his counsel. I am going to object to it as leading.

(Testimony of Hugh L. Jones.)

The Court: I think it is inappropriate to lead him on this.

Mr. Harkins: I am sorry, your Honor.

The Court: Any further elaboration you wish to make on your answer?

A. Your Honor, that is the universal custom adopted before my time, which I think was 1918 when I first went to work with the California Seed Growers Association, one of the first things they told me, never let a bag go out of the warehouse unless it was properly labeled and that label had on it the usual seed man's disclaimer. That was back in 1918.

The Court: You say the usual seed man's disclaimer?

A. That was the accepted wording that the seller of these seeds gives no warranty as regards the purity, productiveness, or any other matter connected with the sale of seed, the productiveness of the product, we are not in any way being responsible for the product. That is accepted and endorsed by the American Seed Trade Association, an association that covers every state in the United States.

Mr. Harkins: I think that is all, Mr. Jones—just a moment. That is all.

Mr. Pierce: Your Honor, do you wish us to begin our cross-examination?

(Recess.)

Mr. Pierce: Your Honor, counsel for both sides have reached a stipulation that in the case which has been referred to in the United States District Court of Denver in which the Dutch Valley Growers——

The Court: The civil action?

Mr. Pierce: The civil action, in which the Dutch Valley Growers were plaintiff and Barteldes was defendant, an answer was filed which raised all of the defenses and all of the issues alleged by the complaint excepting the sale of the quantity of seed in question, which, of course, is admitted, and that these issues were defended by the defendant in that case at that trial.

That stipulation is for the purpose of filling a gap which now exists.

We have offered in evidence at the pre-trial conference all of the other pleadings in that action, but we omitted the introduction of the answer and the stipulation is to cover that and make whole the proceedings in connection with that case.

Mr. Harkins: That stipulation is satisfactory, your Honor.

The Court: I believe you have reached the cross-examination.

### Cross-Examination

By Mr. Pierce:

Q. Mr. Jones, I wish that you would describe for me with a little more detail the lay-out of the property which you have referred to as your home

(Testimony of Hugh L. Jones.)

ranch at Stockton, with reference to the way the fields are arranged—

A. I beg you pardon?

Q. —the way the fields are arranged in which onions were grown in 1943.

A. The ranch consists of 180 acres, it runs east and west. On the south side is Hammer Lake. It is not a right angle, it is inclined a little bit. The west side is about a thousand feet wider than the east end. The seed was produced at that time with some at the east end of it, some of it in the west end, and, as I recall, a little on the south side.

Q. Approximately how many acres at that time, with reference to the particular seeds which are involved in this case, how many acres were then being grown to Yellow Globe Danvers seed?

A. I think about eight and a half acres.

Q. And where were those eight and a half acres located with reference to the fields you have described?

A. They were towards the west end.

Q. How many acres altogether of all types of onions were you growing at that time?

A. They were planted about 50 to 55 acres on the extreme west end, and that eight and a half acres were on the east end and the southern end, I think the south side had a few acres. I think that is all, but I am not positive about that.

Q. Is my understanding correct, then, that the particular acreage of onions which were grown to Yellow Globe Danvers at that time was separated



(Testimony of Hugh L. Jones.)

entirely from the acreage which was grown to the other types of onions?      A. Oh, yes.

Q. Were the onions reaching maturity at the same time of the year?

A. Approximately, within a week or ten days.

Q. Will you describe with a little more particularity, if you will, please, how you harvested the seed of these onions and brought it to the warehouse?

A. The first process in harvesting onion seed is to take the ball, which is done by hand. These little balls or seed heads are placed in a bag which is attached to the picker by a loop around his neck or his waist. When they are filled, they are taken to a truck at the head of the road, dumped into a larger bag, which holds about four or five times the single bags. When the truck is filled, those bags are taken to the drying and cleaning yard on the south side and away from all others, and those heads are dumped out on canvas sheets. These particular canvas sheets we used were about 30 by 30 feet. The ball is left there from approximately 12 to 15 days, depending upon the weather, whether it is warm or cool, until they are thoroughly dried. Then they are threshed and the refuse is raked off.

Q. Where are they threshed, in a warehouse, or out in the open?

A. No, they are threshed on the sheets. The process of threshing is rolling. When the material is rolled down sufficiently, we take a rake and rake off the large parts of the stems or the upper part

(Testimony of Hugh L. Jones.)

of the stem, and they are brought into the mill and cleaned.

Q. And that is what is known as the cleaning process?

A. That is what is known as the preliminary cleaning process.

Q. That is done, you say, in a mill?

A. That is done in a mill.

Q. Is that mill adjoining your drying yard?

A. In this case it is about 200 yards.

Q. I believe you testified in respect to some questions on direct examination as to the separate types or kinds of onions that are cleaned at the same time, or you have instructions to that effect. Did you mean by that that they are cleaned in this preliminary process you have described at the same time?

A. At any time when we have one variety of onion seed to clean, whether it is the initial cleaning or preliminary cleaning, another variety, no matter how similar or how different, is never brought into the mill, it is left out in the field.

Q. However, during this process when it is left out on the sheets you have mentioned in the drying yard, are there several varieties left in the drying yard at the same time, prior to bringing them into the preliminary cleaning place?

A. Yes, whatever variety you have for cleaning, but they are kept separate, perhaps 50 to 60 feet between the sheets.

Q. Is there any other method of designating or keeping them separate?           A. Is there—

(Testimony of Hugh L. Jones.)

Q. Let me withdraw that question. It is clumsily expressed. Are there any other means of designating those as separate varieties, except by keeping them in separate piles?

A. You see, these sheets are all contiguous, they overlap, the head of the sheet has a tag sewn onto it.

Q. What?

A. The head of the sheet has a tag sewn onto it.

Q. I didn't hear that one word.

A. A tag sewed on it.

Q. A tag sewed on it, s-e-w-e-d? A. Yes.

Q. All right. And what does that tag say?

A. That tag has the lot number on it and the variety of the seed.

Q. Now, do you handle this personally yourself, or do you have a foreman?

A. Oh, no, I do all the supervisory work attached to this business. It is strictly a one-man concern. The only labor I hire is the labor that does the actual manual, what we call stoop labor.

Q. Do you have a foreman?

A. Well, he might designate himself as a foreman, if I give him instructions to tell the other boys to do this or that, he might classify himself as a foreman, but I don't classify him as a foreman.

Q. Obviously, Mr. Jones, you can't be present every hour of the day every day.

A. I would like to call your attention to the fact that I live on that ranch.

Q. I beg your pardon?

(Testimony of Hugh L. Jones.)

A. I would like to call your attention to the fact that I live on that ranch.

Q. Yes, I understand.

A. And I kept very close supervision over everything that went on on that ranch.

Q. I understand that, but you are not, of course, there twenty-four hours a day, nor were you there at every hour of the operations, that is obvious, and there must have been somebody there in charge when you were forced by business or otherwise to leave.

A. Not when there was anything in connection with the seed or processing seed.

Q. Is it fair to state that you were in charge when every single bag of seed was brought in and placed on the sheets that you have described?

A. No.

Q. If you weren't there, who was in charge of that?

A. Can I give you an example?

Q. If it is going to clarify it, certainly.

A. I hope that it will. When I would like to take that seed and move the seed, I would put a boy on it and he would go down the field with four or five assistants, if necessary, if not necessary, only one, and he would lift those piles at the head of the row and put them on the truck, and I wouldn't let them sack two different varieties, so they wouldn't make a mistake by going in there and moving the wrong pile.

Q. All right, I think you have made that quite clear. How long was this process by which the onions were kept out in the drying yard—a shorter

(Testimony of Hugh L. Jones.)

way of saying it, how long is the drying process?

A. That operation might take a month, it might take six weeks, it might take five weeks before they came in the mill, depending on what we had in the mill and what they were running.

Q. During this period of time were those seeds in sacks on the sheets, or were they in bulk on the sheets?

A. Well, we will go back to the process again. When the sheets are rolled—some called it threshed, it is the same thing in the long run, it is left there until the boys get ready to sack it, then it is sacked up and waits the truck to take it to the mill. Does that answer your question?

Q. I think so. Then it would be in bulk for a period of time of about a month, is that correct?

A. Yes.

Q. Now, at this time, and I am referring to the time that the seed that you subsequently sold to Barteldes was being dried, how many varieties of onions were grown on your home ranch?

A. I think there were three varieties.

Q. Three varieties?

A. Yellow Globe Danvers, early Yellow Globe, and, as near as I can recall, there was a little White Globe, not very much White Globe.

Q. What color of onion would be the White Globe?

A. The White Globe, as its name indicates, would be a white color.

Q. Is it a bright white?

A. Yes, sir, waxen white.

(Testimony of Hugh L. Jones.)

Q. And the other types you have mentioned, what color?      A. They are yellow.

Q. Is there any difference between the early Globe and the Stockton Yellow Globe?

A. The early Globe is a little darker than the Stockton Yellow Globe.

Q. Mr. Jones, I am going to show you this photostatic copy which you were shown on direct examination, I believe it is a photostatic copy of Plaintiff's Exhibit Number 7. Isn't this, Mr. Jones, just a form of printed contract which you were then using under the terms of which you agreed to grow seeds for various purchases?

A. That is correct, modified by those words, "Surplus 1943 crop." If you put the word "surplus" on there it is not an agreement to grow.

Q. In other words, in this particular case, in lieu of furnishing a regular price list, you used one of your contract forms and distinguished it by putting the word "surplus" on it, is that right?

A. It amounts to the same thing.

Q. It wasn't exactly the same, was it, as your usual price list?

A. It is about the same as my usual price lists.

Q. Well, do you use this all the time as a price list?      A. Yes.

Q. Do you use that form?      A. Yes.

Q. I believe you testified on direct examination that 3200 pounds was the total of your crop of Yellow Globe Danver onions grown or in the warehouse at the particular time that you made this sale to the Barteldes Seed Company?

(Testimony of Hugh L. Jones.)

A. As near as I can recollect, that was the testimony and that was the fact.

Q. Wasn't it a fact that the quantity was 4,000 pounds or 4100 pounds?

A. Well, now, let me see, I don't say—I think it was more like——

Q. I want to call your attention to——

A. It may be, I couldn't say definitely.

Q. You remember when your interrogatories were taken of this case, Mr. Jones? Well, let me shorten this up. Didn't you state when your interrogatories were taken that the quantity was 4100 pounds?

A. Well, you will have to read it. I couldn't remember all this.

Q. Well, would you like to read that yourself?

A. Yes.

Q. This is the statement to which I refer (submitting document to witness).

A. Well, that is on the scale.

Q. All I am trying to do is find out which was correct. Do you now recall there was 3100 pounds or 4200 pounds?

A. That happened six years ago——

Q. I can readily understand, Mr. Jones, and my purpose of impeachment is not to discredit your statement, it is solely to ascertain whatever your correct recollection is at this time.

A. That may be a little under and what my testimony was a few minutes ago may be a little over. I said approximately.

(Testimony of Hugh L. Jones.)

Q. Then it would be a fair understanding of what you now recall it was somewhere between 3200 and 4200 pounds?      A. Yes.

Mr. Pierce: All right, thank you. May we have about a one minute recess while I discuss something with counsel here?

Your Honor, that is all from this witness.

Mr. Harkins: No further redirect examination.

Mr. Voorhies, will you take the stand, please?

### CYRUS F. VOORHIES

called for the Defendant, sworn.

#### Direct Examination

By Mr. Harkins:

Q. Mr. Voorhies, what is your business?

A. Seed grower.

Q. And are you engaged in business for yourself, or are you employed by someone?

A. At the present time for myself.

Q. And where is your business located, Mr. Voorhies?      A. 30 Davis Street, San Francisco.

Q. And how long have you been in the seed business, Mr. Voorhies?      A. Thirty years.

Q. In various capacities in the seed business, or would you relate the capacities?

A. Well, I was the President of the corporation and my son and I bought it out here about nine or ten years ago, so my son and I have conducted the business as partners and I have been the President and the Manager.



(Testimony of Cyrus F. Voorhies.)

Q. What is the name of that business?

A. Sherwood Seed Company.

Q. Located at 30 Davis Street, San Francisco?

A. Yes.

Q. And prior to that time were you employed by any other companies?           A. No.

Q. And at times in the seed business have you been in the growing part of the seed business, as well as the selling?

A. Well, we grew and then sold what we grew. We were known as growers.

Q. Your principal business, is it wholesale or retail?           A. Wholesale.

Q. And is it principally what is known as the garden seed business?

A. Vegetable seed, yes.

Q. Vegetable seed, rather than the field?

A. Yes, no field.

Q. Have you been engaged in sales in the State of California, as well as other parts of the United States?

A. Yes, but our principal business has been outside of California, the large majority of it.

Q. Are you familiar, Mr. Voorhies, with the general custom and usage of the seed trade, both in the State of California and in other parts of the United States relative to disclaimer and non-warranty clauses?

The Court: During the year 1943.

Mr. Harkins: During the year 1943. I am sorry, your Honor.

A. Yes.

(Testimony of Cyrus F. Voorhies.)

Q. Will you state briefly to the court what that custom and usage as to disclaimer and non-warranty was during the year 1943?

Mr. Rogers: It is understood our objection is of record, your Honor?

The Court: Yes. You may answer. What was the custom in 1943?

A. Well, the custom has always been, including, of course, 1943—

The Court: In what territory is this?

A. In the United States of America, that it is printed on all, I think practically all that I have ever come in contact with seeds—

Mr. Harkins: We are not interested in what is printed. I am asking what the custom is.

A. Oh, the non-warranty, that you don't guarantee the productiveness of the seed sold; that is, the productiveness, et cetera, et cetera.

The Court: "Et cetera" means what?

Q. (By Mr. Harkins): Be more particular, Mr. Voorhies.

A. The productiveness and the other—varieties, type, et cetera, beet, carrot, lettuce, parsnip, anything that we sell. That has been in existence before my time—it may have been corrected in language several times in the association—I might add, if I might, that there is one national association of seed men, there is a state association, and there is regional associations, and, of course, they have their attorneys, and the American Seed Trade Association, I

(Testimony of Cyrus F. Voorhies.)

guess, was the ones that years ago thought out this non-warranty clause that was brought up through the attorneys of the association, and I guess it has been tested time and time again, I don't know the exact details of the cases, but that is the custom of the trade, whether they are members of any association or just in the seed business, and I believe that applies to everybody in the seed business, retailers, wholesalers, growers, everybody.

Q. Are you a member of the, I believe it is known as the American Seed Association?

A. American Seed Trade Association.

Q. American Seed Trade Association, you are a member of that?      A. Yes.

Q. Did you ever hold any position in that association?      A. Yes, I was President.

Q. In what year was that?      A. 1939.

Mr. Harkins: That is all, Mr. Voorhies.

### Cross-Examination

By Mr. Rogers:

Q. Mr. Voorhies, has the custom to disclaim that you have mentioned been changed from year to year in your experience?

A. In my experience, I think it has been changed once that I know of.

Q. When was that?

A. Oh, I think it was 1942, 1943, or 1944.

Q. 1942, 1943, or 1944?

A. I am not sure, I am not positive, I can't give you the date. I know that sometime on account of

(Testimony of Cyrus F. Voorhies.)

that change we had to have our stationery reprinted, but whether it was three years ago or six years ago I am not sure.

Q. What was the change?

A. We wouldn't be responsible for more than the invoice price of the seed.

Q. What was the old?

A. Wouldn't be responsible in any respect. If I would have known you would have asked that question, I would have brought you the exact wording. I can't tell you exactly word for word, but that is the substance of the change.

Q. Why was the change made?

A. That I don't know. That was made by the attorney and the Legislative Committee of the American Seed Trade Association. I couldn't tell you who was the chairman, I don't know. I wasn't active after I was past president.

Q. That was two years after you were president of the American Seed Trade Association?

A. I don't know the date. 1939 I was president.

Q. You say it was changed probably in 1942 or 1943?

A. It may have been.

The Court: Mr. Voorhies, on direct examination you testified to what the custom was in 1943. Now, are you mistaken? Was the change made so that the change was in effect in 1943?

A. Well, your Honor, I had reference to the disclaimer, that was in effect. It has been in effect ever since before my time, but the wording of it, I couldn't tell you what the exact change or the exact date was.

(Testimony of Cyrus F. Voorhies.)

The Court: Well, the change is quite important. You told me what the custom was in 1943. Now, you say there was a change made and you are uncertain as to when it was made, whether it was made so it was in effect in 1943. It is quite important to know from you what your testimony is as to the custom in 1943, and particularly in October of that year.

A. Yes. Well, I would have to get the record to give you the date. I can't tell you. I know it was since the time I was President in 1939.

Q. (By Mr. Rogers): Mr. Voorhies, are you familiar with the custom in Georgia?

A. Georgia, no.

Q. Are you familiar with the custom in South Carolina?

A. I am not familiar with the custom in any particular state.

Q. Are you familiar with the custom in Colorado?      A. No.

Q. Are you familiar with the custom in Louisiana? Or in Mississippi, or Wisconsin?

A. I could not—

Q. North Dakota?

A. You mean as far as the disclaimer?

Q. Yes, just what we are talking about.

A. I am familiar to this extent, that all states that we might ship to or any other grower in any of the states you mention we have our disclaimer on the letterhead, bill head, and the tag, but as to what their interpretation is, I haven't been so unfortunate as to have had experience.

(Testimony of Cyrus F. Voorhies.)

Q. Have you had any claims made against you, sir?      A. No, sir.

Q. Never had a claim against you?

A. Just one that I can recall, and I didn't grow the seed.

Q. Did you have a suit filed against you?

A. What?

Q. Did you have a suit filed against you?

A. No, there was no suit, just correspondence.

Q. Did you settle the claim?

A. The party I bought the seed from settled the claim.

Q. That was a grower?

A. Well, he was a grower and wholesaler.

Q. When was that, Mr. Voorhies?

A. That was about twenty years ago.

Q. That would be prior to the change in the disclaimer?      A. Oh, yes, twenty years ago.

Q. Now, Mr. Voorhies, you testified you knew what the custom was throughout the United States, and you have since modified that for us. I know who you are and I respect you. Was there any other change made in the custom?

A. Not that I know of.

Q. Besides what you mentioned?

A. Not that I know of. Do you mean a change in the disclaimer?

Q. Yes, in the custom to which you have testified.

A. Not that I know of.

Q. Was there any change made in regard to description?      A. Not that I know of.

Q. Mr. Voorhies, I hand you here a letter identi-

(Testimony of Cyrus F. Voorhies.)

fied as Plaintiff's Exhibit 9, which is a letter from the Standard Seed Farms Company to the Barteldes Seed Company, and ask you if this clause, which you say is customary, appears thereon?

A. I believe that is about the same thing we use. I think it is all the same.

Q. Will you read that clause, please?

A. "The Standard Seed Farms Company give no warranty, express or implied, as to the productiveness of any seeds we sell and we will not be in any way responsible for the crop. Our liability in all instances is limited to the purchase price of the seed."

Q. Is there anything said there about description?      A. Not a word.

Q. Are you familiar with the attitude of the Department of Agriculture toward disclaimer or responsibility for description of seed sold in interstate commerce?      A. No.

Q. Are you familiar as a seed man with the Federal Seed Act of 1939?

A. I have read the Federal Seed Act, I went through it once, there was nothing in there that interested me except the labeling of seed and germination and weed seeds and things like that.

Q. You were president of the Seed Association in 1939 and know that the Act did pass?

A. Yes, I was elected in 1938, served in 1939.

Q. Did you have any discussions as President of the American Seed Association with any representative of the Department of Agriculture in regard to the provisions of it?

A. No. They had a legislative committee with a

(Testimony of Cyrus F. Voorhies.)

chairman and they took up the legislative work for the association.

Q. Did reports come to you——

A. The reports came out at the end of the year. It is published the following year.

Q. Let me ask you again: You had no information in regard to the Federal Seed Act of 1939 as President of the American Seed Trade Association?

A. I don't say I haven't any idea, I have read it and I knew I wasn't doing anything wrong, and I abided by it, and there was nothing that affected me whatsoever, that I could see, I knew what the germination should be, the tolerance allowed, there was no weed seeds allowed, and that is all.

Q. Did the Department of Agriculture have anything to do with the change of custom that you have described?

A. You mean the disclaimer?

Q. Yes, sir.

A. No, I don't think so. I don't know, but I don't think they did.

Mr. Rogers: That is all, Mr. Voorhies.

### Redirect Examination

By Mr. Harkins:

Q. Mr. Voorhies, I am going to show you Plaintiff's Exhibit 6 here, and call your attention to the small print at the top of the letter and ask you to read that.

A. Aloud?

Q. Will you read that aloud, Mr. Voorhies, please?



(Testimony of Cyrus F. Voorhies.)

Mr. Rogers: Now, if the Court please, this is the Plaintiff's letter we are talking about now.

The Court: Pardon me?

Mr. Rogers: This is the Plaintiff's letter we are talking about now.

Mr. Harkins: That is correct.

Mr. Rogers: I think it is immaterial.

The Court: What is the letter?

Mr. Harkins: The letter contains the disclaimer clause at the head of it.

The Court: Is it something in evidence?

Mr. Harkins: Yes, your Honor.

The Court: Well, if it is in evidence, there is no use reading it aloud.

Mr. Harkins: Is that a form of warranty and disclaimer clause that you have used for the seed trade, Mr. Voorhies?

A. Well, the wording here is a little different from our wording.

Q. But you have seen that language?

A. Yes. I have done business with Mr. Barteldes. "The Barteldes Seed Company gives no warranty"——

Mr. Harkins: That is all right, Mr. Voorhies. We won't bother reading it in. That is all, Mr. Voorhies.

Mr. Rogers: Thank you.

Mr. Harkins: Mr. Hamilton, will you take the stand, please?

## JAMES WILLIAM HAMILTON

called for the defendant, sworn.

## Direct Examination

By Mr. Harkins:

Q. Mr. Hamilton, will you state your occupation, please?

A. My present occupation is Manager of the Seed Division of the Pacific Walnut Company.

Q. And how long have you been engaged in the seed business in any capacity, approximately?

A. Well, I believe it was 1919 or 1920.

Q. Have you been employed by any other concerns in the seed business, Mr. Hamilton?

A. Yes, I was with the old C. C. Morris Company Seed Firm, that was the original firm I started with, then they merged in 1920 with Ferry, and then in 1938 I started the Seed Division with the Pacific Walnut Company.

Q. Those three companies you have referred to, were they California companies?

A. C. C. Morris was a California Company; Ferry, I think I am safe in saying, was a national company—the merger, of course, that took place made them a national company. The Pacific Walnut Company only operates in California.

Q. In your employment by those various companies, Mr. Hamilton, have you engaged in dealing in vegetable seeds, as well as field seed?

A. All my work with C. C. Morris and Ferry and Morris as a genetist was entirely devoted to vegetable seed.

(Testimony of James William Hamilton.)

Q. And are you familiar with a general custom of the seed trade in the State of California relative to disclaimer or non-warranty clauses in the year 1943?      A. Yes.

Q. Do you recall what that disclaimer or non-warranty clause provided for?      A. In 1943?

The Court: October.

Mr. Harkins: October of 1943.

A. Well, the company gives no express or implied warranty as to productiveness. Their liabilities are limited to the purchase price of the seed only.

Q. And was that disclaimer or non-warranty clause the general custom in the seed trade in the State of California in October of 1943, if you know?

A. That particular disclaimer?

Q. That is right.

A. That had to be accepted in 1943. That was a Government order, because there was many cases tried on the old disclaimer that threw that out. The old disclaimer was the one where there was germination, variety, and so forth and so on, and that didn't hold up in the Federal Court.

Q. And the new clause restricted the liability to the purchase price of the seed?

A. Purchase price of the seed only.

Q. And, Mr. Hamilton, that non-warranty clause that you just spoke of, that was in effect in October of 1943, do you know that met with the approval of the United States Department of Agriculture?

A. It was offered by the Department, therefore I would say yes.

Q. And do you know the reason or purpose of the

(Testimony of James William Hamilton.)

disclaimer or non-warranty clause that was in effect in October, 1943?

A. That disclaimer or non-warranty clause was put there for the sole purpose that no man has control of the content or chromosomes that go into any living matter. We don't have control of cross-pollenization, therefore, we cannot be absolutely positive of our generic strains, so that we do not know what is going to happen in the cellular development of the plant itself.

Another thing, we get into reverts or what is commonly called in the trade as rogues.

Another reason for that in there, the big strike that took place, I believe it was in 1916 or '17, there was a firm back east that had some seed that was mixed maliciously. They didn't know it was mixed until it was shipped out and there was quite a national case made of it, and that is where you may say the real prevalence of the non-warranty clause was born.

Mr. Harkins: That is all.

### Cross-Examination

By Mr. Rogers:

Q. Only one question, Mr. Hamilton: I understand that the clause was used to protect the seedsmen from erratic growth in production. By that you don't mean variety of seed?

A. That would not be variety. That would be a condition that we could not control. Variety is something that is established.

(Testimony of James William Hamilton.)

Mr. Rogers: Thank you, sir. I have no further questions.

Mr. Harkins: That is all, your Honor.

The Court: Any rebuttal?

Mr. Rogers: If the Court please, in the pre-trial—we have no rebuttal, your Honor—if the Court please, in the pre-trial discussion your Honor asked if the case of Dutch Valley Growers against the Barteldes Seed Company, if Judge Simms' opinion had been made a matter of record. It wasn't made a matter of record, but I have here his memorandum on questions of law which governed his rulings throughout the case. I do not submit it in evidence, but for your Honor's consideration and for counsel's consideration I would like the liberty of submitting a copy which was prepared in Mr. Pierce's office on Judge Simms' rulings.

Mr. Harkins: If your Honor please, a matter just came to my mind. I wonder if I might call Mr. Barteldes under Rule 42 as an adverse witness, your Honor?

The Court: You may.

### ARMIN BARTELDES

called by the defendant under the provisions of Rule 42, having been previously sworn, testified as follows:

#### Direct Examination

By Mr. Harkins:

Q. Mr. Barteldes, are you familiar with the gen-

(Testimony of Armin Barteldes.)

eral custom in the seed business throughout the United States in October, 1943, relative to disclaimer or non-warranty clauses?

A. I thought I was until this Dutch Valley case came on.

Q. And do you recall at this time what that disclaimer or non-warranty clause provided?

A. Well, there was two of them about that time. I don't know when the change came in. They got me all confused.

Q. Well, I am going to show you Plaintiff's Exhibit Number 6 and call your attention to the disclaimer clause at the head of your letter there, and ask you if that is the disclaimer clause used by the Barteldes Seed Company in October of 1943?

A. Yes, that was.

Mr. Harkins: That is all, Mr. Barteldes.

The Court: Now, both sides rest? What is counsel's pleasure? Do you wish to argue this now or submit it on briefs?

(Discussion as to submitting matter to the court.)

(The matter was ordered submitted on briefs, 20, 20 and 10.)

[Endorsed]: Filed February 9, 1950.

Plaintiff's Exhibit No. 4

For

Customers' Use Only

San Francisco, Calif., Oct. 20, 1943

On arrival seeds Pay to the order of  
Wells Fargo Bank and Union Trust Co., San

Francisco, Calif. \$5029.30

Five thousand and twenty nine and 30/100 Dollars  
Value received and charge the same to account of

STANDARD SEED FARMS CO.

/s/ H. L. JONES,  
Mgr.

To

Barteldes Seed Co.,  
Denver, Colorado.

50487

[Stamped]: The First National Bank. Paid. Oct.  
28, 1943. Collections. Denver, Colo. [Stamped]:  
Pay to the order of Any Bank or Banker. Your  
Endorsements Guaranteed. Oct. 22, 1943. [Illegible]  
Bank & Union Trust Co. San Francisco. 11-16. [Il-  
legible] Dept. A. W. [Illegible]

## PLAINTIFF'S EXHIBIT No. 5

Western Union

1943 Oct. 20 P.M. 2 44

FA230 LG—Denver Colo 20 312P

Standard Seed Farms Co—PB. 572

We confirm telephone purchase from you for prompt shipment by Pacific Intermountain truck following onion seed: 20 bags Yellow Globe Danvers 2.50, 10 bags Southport Yellow Globe 2.65, 5 bags Early Yellow Globe 2.65 1 bag Ebenezer 2.75; 5 bags French Breakfast .30; 5 pounds Giant Pascal celery 1.75; all onion 90% or better germination fob Stockton net cash. Airmail invoice and will airmail remittance or draft Colorado National if you prefer.

THE BARTELDES SEED CO.

20 2.50 10 2.65 5 2.65 1 2.75 5 .30 5 1.75 90%.

da 312p B

No. 26943 To....

By K345p To be mail

[Endorsed]: Filed September 22, 1949.



PLAINTIFF'S EXHIBIT No. 6

The Barteldes Seed Company  
1521-25 Fifteenth Street, Denver 17, Colorado  
P. O. Box 5170 Terminal Annex

October 21, 1943.

Standard Seed Farms Co.  
Stockton, California

The Barteldes Seed Co. Gives No Warranty, Express or Implied, as to Purity, Description, Quality, Productiveness or Any Other Matter of Any Seeds, Bulbs or Plants. They Send Out, and Will Not Be in Any Way Responsible for the Crop.

Gentlemen:

We acknowledge receipt of your surplus list of October 18th and confirm having purchased from you over the telephone for prompt shipment all f.o.b. Stockton, California, items as enumerated on the telegram copied below, all to be of high germination, onion seed to germinate 90% or better.

After the telephone conversation we wired you as per copy enclosed reading as follows:

“We confirm telephone purchase from you for prompt shipment by Pacific Intermountain truck following onion seed: 20 bags Yellow Globe Danvers 2.50; 10 bags Southport Yellow Globe 2.65; 5 bags Early Yellow Globe 2.65; 1 bag Ebenezer 2.75; 5 bags French Breakfast .30; 5 pounds Giant Pascal celery 1.75; all onion 90% or better germination fob Stockton

net cash. Airmail invoice and will airmail remittance or draft Colorado National if you prefer.”

We trust you are making prompt shipment by Pacific Intermountain Truck.

We understand that the 1000# of Southport Yellow Globe was grown in Idaho and you will have it shipped by your truck to your place in a few days and forward promptly on receipt of same.

We told you over the phone that if you would send us invoice by air-mail we would remit by air-mail promptly on the items as soon as you have shipped them or, if you prefer, you can make draft on us through the Colorado National Bank of Denver.

Glad we were able to trade with you and if you have other choice quality lots to offer later on you might let us know.

We understand that these stocks are all choice-quality stocks true to type.

Yours very truly,

THE BARTELDES SEED CO.,

By /s/ W. P. STUBBS,

Manager.

WPS:mhn

Enclosure: 2

P.S. Since writing the above we have wired you as per copy of telegram enclosed reading as follows:

“Increase order Early Yellow Globe Onion to 1000 pounds. Confirm.”

This makes a total of 1000# of Early Yellow Globe at \$2.65 per pound.

/s/ W. P. S.

[Endorsed]: Filed September 22, 1949.

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PLAINTIFF'S EXHIBIT No. 7

Standard Seed Farms Company

Stockton, California

Contract Price List

Vegetable Seeds

Season of Oct. 18, 1943

Surplus 1943 Crop

Oct. 18, 1943.

This Agreement, made in duplicate on ....., 19....., by and between the Standard Seed Farms Company, Seed Growers of Stockton, California, hereinafter called the Seller, and..... hereinafter called the Purchaser.

Witnesseth: 1. Seller agrees to sell and deliver and purchaser agrees to accept and pay for the varieties of seeds in the amounts, at the prices as set forth below, and subject to the terms and conditions herein provided.

2. Seller agrees to plant, or cause to be planted, during the season of 19....., an acreage of land which will produce, under normal conditions, an amount of seed of the varieties herein named which will be sufficient to enable the Seller to deliver the quantities of the seeds herein contracted for; and the Seller agrees to deliver as soon as possible after harvest, such seeds in good merchantable condition, as herein defined, F.O.B. growing station, containers extra at cost, and not returnable. The term "in good merchantable condition" is defined as seeds properly cleaned for seeding purposes, approximately free from foreign seeds distinguishable by their appearance and of a germination equal to the fair average germination of the crop of the current year.

3. In case of partial or total failure of any or all crops planted for the purpose of producing the varieties of seeds herein named, or, in case of damage to any seed through fire, accident or other

casualty beyond Seller's control, the Seller shall be obligated to deliver, if at all, proportional quantities only.

4. Purchaser shall make payment for seeds delivered, by a trade acceptance due and payable 60 days from date of shipment, or by cash within 30 days from date of shipment, less a discount of  $1\frac{1}{2}\%$ .

If, at any time, the financial condition of the Purchaser becomes unsatisfactory to the Seller, the Purchaser agrees, upon receipt of written notice to that effect, and upon demand of the Seller, to pay for the seeds in advance of shipment, less a cash discount of  $1\frac{1}{2}\%$ , and if such payment is not made within ten (10) days from the receipt of such demand for payment, this agreement shall thereupon be deemed to be breached by the Purchaser.

5. Except as herein otherwise expressly provided, the Seller gives no undertaking or warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds sold by it and will not be in any way responsible for the crop.

6. Purchaser's claims for shortages of deliveries must be made to Seller immediately on receipt of shipment and all germination tests must be made and reported in writing (including telegram) by Purchaser to Seller within 15 days after receipt of shipment.

In Witness Whereof, the parties have hereunto set their hands on the day and year first above written.

Standard Seed Farms Company .....  
The Seller ..... The Purchaser

By Offers made subject prior sale. By.....

Quantity	Beet	Price Per Lb.
.....Crosby's Egyptian .....		
.....Crimson Globe .....		
.....Detroit Dark Red Turnip .....		
.....Early Blood Turnip .....		
.....Edmand's Blood Turnip .....		
.....Extra Early Ecllipse .....		
.....Extra Early Flat Egyptian .....		
.....Early Wonder .....		
.....Mangels, Danish Sludstrup .....		
.....Mangels, Giant Intermediate .....		
.....Mangels, Giant Long Red .....		
.....Mangels, Half Sugar Rose .....		
.....Mangels, Golden Tankard .....		

Quantity	Carrot	Price Per Lb.
.....	Bunching, special .....	.....
.....	Chantenay .....	} \$1.40
.....	Chantenay red core .....	
.....	Danvers Half Long .....	.....
.....	Early Scarlet Horn .....	.....
.....	Imperator .....	\$1.40
.....	Improved Short White .....	.....
.....	Improved Long Orange .....	.....
.....	Nantes, coreless .....	.....
.....	Oxheart .....	.....
.....	Red St. Vallery .....	.....
.....	Yellow Belgian .....	.....

Celery

.....	Golden Self-Blanching, Tall .....	.....
.....	Golden Self-Blanching, Dwarf .....	.....
.....	White Plume .....	.....
.....	Giant Pascal—5 lbs. ....	\$1.75
.....	Utah, green .....	\$1.75
.....	Celeriac, smooth Prague .....	.....

Endive

.....	Broad Leaved—full hearted batavian .....	.....
.....	Curled Leaved—Green .....	.....
.....	Curled Leaved—White .....	.....
.....	Pancalier, pink rib .....	.....

Lettuce

.....	Big Boston, w. s. ....	.....
.....	Black Seeded Simpson, b. s. ....	\$1.00
.....	Denver Market, w. s. ....	.....
.....	Early Curled Simpson, w. s. ....	.....
.....	Grand Rapids, b. s. ....	.....
.....	Hanson, w. s. ....	.....
.....	Hubbard's Market, w. s. ....	.....
.....	Iceberg, w. s. ....	\$1.10
.....	May King, w. s. ....	.....
.....	New York, w. s. all types .....	.....
.....	New York, Special .....	.....
.....	New York, Number 12 .....	.....
.....	New York, Imperial, all types .....	.....
.....	Salamander, b. s. ....	.....

Quantity	Lettuce—(Continued)	Price Per Lb.
.....	Prize Head, w. s. ....	\$1.00
.....	Paris White Cos, w. s. ....	
.....	Silesia Early Curled, w. s. ....	
.....	White Boston .....	
	Leek	
.....	American Flag .....	
	Mustard	
.....	Chinese—Broad Leaf .....	
.....	Giant Southern Curled .....	
.....	Fordhook Fancy .....	
.....	Ostrich Plume .....	
	Onion	
.....	Ailsa Craig .....	
.....	Australian Brown .....	
.....	Ebenezer .....	bot all \$3.00
.....	Early Red Flat .....	\$2.85
.....	Early Yellow Globe Clarks.....	bot all \$3.00
.....	Ohio Yellow Globe .....	
.....	Prizetaker .....	
.....	Red Wethersfield .....	
.....	Southport Red Globe .....	\$3.00
.....	Southport White Globe .....	
.....	Southport Yellow Globe .....	\$3.00
.....	Sweet Spanish, Valencia .....	
.....	Sweet Spanish, Riverside .....	
.....	Sweet Spanish, White .....	
.....	White Lisbon Oregon Danvers .....	\$2.65
.....	White Portugal .....	
.....	White Silver Skin .....	
.....	Yellow Flat Danvers .....	
.....	Yellow Globe Danvers—bot 2,000 lbs. ....	\$3.00
.....	Yellow Dutch or Strasburg .....	
.....	Early Red Semi globe .....	\$2.85
	Parsley	
.....	Moss Curled .....	
.....	Plain Leaved .....	
.....	Turnip Rooted Hamburg .....	
	Parsnip	
.....	Half Long Guernsey .....	
.....	White Hollow Crown .....	

Quantity		Price Per Lb.
	Radish	
.....	China Rose .....	\$0.35
.....	Crimson Giant .....	
.....	Early Scarlet Turnip .....	
.....	French Breakfast .....	\$0.35
.....	Icicle .....	
.....	Long Scarlet Short Top .....	
.....	Long Brightest Scarlet .....	
.....	Scarlet Globe (Vicks) .....	\$0.35
.....	Sparkler, Half White .....	
.....	White Tipped Scarlet Turnip .....	
.....	White Vienna .....	
	Salsify	
.....	Mammoth Sandwich Island .....	
	Sweet Peas	
.....	Eckford Mixed .....	
.....	Spencer Mixed—Select .....	
	Swiss Chard	
.....	Lucullus .....	
.....	White Ribbed, Smooth .....	

Our time and equipment is devoted exclusively towards developing and improving standard types of vegetable seeds as used by market garden and shippers' trade.

Shipment Rail or Water

[Stamped]: Surplus Crop 1943.

[Endorsed]: Filed September 22, 1949.

## PLAINTIFF'S EXHIBIT No. 9

Cable "Stanseed"

Standard Seed Farms Company  
of California

Wholesale Growers Garden Seeds

Stockton, Calif.

Oct. 20, 1943.

The Barteldes Seed Co.,  
Denver, Colorado.

Gentlemen:

Atten: Mr. Stubbs:

The Standard Seed Farms Co. give no warranty, express or implied, as to the productiveness of any seeds we sell and we will not be in any way responsible for the crop. Our liability in all instances is limited to the purchase price of the seed.

This will confirm our telephone message, also receipt of your wire of yesterday.

Everything seems to be O.K. as regards the agreement but would like to call your attention to the matter of S. P. Yellow Globe, as this was emphasized in our offer over the phone.

This seed is still in Idaho and is waiting for the first cleaning or processing. It is coming down here by truck just as fast as they can get it ready, but they have considerable cleaning to do up there so it may be delayed.



The amount we booked was 1000 lbs. subject the crop turn out, you of course to get anything up to 1000 lbs. Is this agreeing to your views.

The French Breakfast radish is in Washington state and we expect down here anytime for final processing.

The ton of Yellow Globe Danvers was shipped out last night and we have assurance that it should reach Denver in about four days, possibly a little less.

Thanking you for this very nice share of your business, we remain,

Very truly yours,

STANDARD SEED FARMS CO.,

/s/ H. L. JONES,

Mgr.

HLJ.KM.

[Marginal Note]: Mail O.K. 5029<sup>30</sup>

[Endorsed]: Filed September 22, 1949.

## DEFENDANT'S EXHIBIT A

[Deft. Stockton #2—shown in pencil on original.]

[Stamped]: 12735.

(For use in connection with Uniform Domestic Order Bill of Lading, adopted for Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

This Memorandum is an acknowledgement that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

Shipper's No. ....

Independent Freight Lines

Agent's No. ....

Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading, at Stockton, Calif., Oct. 20, 1943, from Standard Seed Farms Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined, as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original Order Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

Consigned to Order of Standard Seed Farms Co.,

Destination Denver, State of Colorado.

Notify Barteldes Seed Co., at Denver, State of Colorado.

Route Independent Freight Lines.

No. Packages	Description of Articles	*Weight
20 Bags	Garden Seed (Onion).....	2048
	Valued: \$5,012.50	
	<i>Bags</i> <i>16.80</i>	
	<hr/>	
		<i>\$5,029.30</i>

[Italics appeared in red crayon on original.]

\* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding .....

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

Standard Seed Farms Co., Shipper

Per Ascension Olmos.

The fibre boxes used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of Rule 41 of the Consolidated Freight Classification.

Independent Freight Lines, Agent

Per J. V. Sullivan.

[Endorsed]: Filed March 21, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON  
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals, or certified copies of originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint.

Minute order of Dec. 31, 1948.

Answer.

Memorandum, dated May 10, 1949.

Pre-trial order.

Memorandum and order, dated May 10, 1950.

Findings of fact & conclusions of law.

Judgment.

Notice of entry of judgment.

Motion to amend findings & for additional findings to be made.

Motion for a new trial.

Order, dated July 24, 1950.

Notice of appeal.

Designation of record.

Motion to extend time for filing the record on appeal and docketing the action.

Order extending time for filing of record on appeal.

Amended designation of record.

Designation of additional portions of the record requested by appellee.

Plaintiff's exhibits 1 to 9 incl.

Defendant's exhibits A & B.

Two (2) Volumes Reporter's Transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 9th day of November, 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ C. C. EVENSEN,  
Deputy Clerk.

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[Endorsed]: No. 12735. United States Court of Appeals for the Ninth Circuit. H. L. Jones, Appellant, vs. Barteldes Seed Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed November 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals  
Ninth Circuit

No. 12735

THE BARTELDES SEED COMPANY, a Corporation,

Plaintiff and Appellee,

vs.

H. L. JONES, Individually and Doing Business  
Under the Style and Trade Name of STAND-  
ARD SEED FARMS COMPANY,

Defendant and Appellant.

### STATEMENT OF POINTS AND ASSIGNMENT OF ERRORS

The Appellant sets forth the following points on which he intends to rely on appeal:

1. That the Court erred in not finding that the law of the State of California governed the performance of the contract which is the subject of this action.

2. That the Court erred in not taking judicial notice of the custom and usage in the seed business not to warrant the description, purity, productiveness or any other matter of the seeds sold, or that seller would not be responsible for the crop.

3. That the Court erred in not finding that the custom and usage in the seed business became an integral part of this contract and negatived any express or implied warranty as to description,

purity, productiveness or any other matter of the seeds sold, and that the seller would not be responsible for the crop.

4. That the Court erred in not finding that the "disclaimer clause" set forth in defendant's surplus list, plaintiff's Exhibit 7, expressly negated any express or implied warranty in the description, purity, productiveness or any other matter of the seeds sold.

5. That the Court erred in denying the defendant's motion to amend the findings of fact and conclusions of law.

6. That the Court erred in denying defendant's motion for a new trial.

/s/ JAMES I. HARKINS,

/s/ ALBERT E. CRONIN, JR.,

Attorneys for Defendant-  
Appellant.

[Endorsed]: Filed Nov. 16, 1950.

[Title of Court of Appeals and Cause.]

### DESIGNATION OF RECORD

To the Clerk of the Circuit Court of Appeals of the  
United States, for the Ninth Circuit:

You are hereby requested to include for the permanent record in the above cause the following:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Court's Memorandum and Order.
5. Motion to Amend the Findings of Fact.
6. Motion for New Trial.
7. Judgment dated June 14th, 1950.
8. Notice of Appeal.
9. Statement of Points and Assignment of Errors.
10. Testimony of the defendant, H. L. Jones, beginning on page 19, and ending on page 43, of the Transcript, Afternoon Session.
11. Testimony of Cyrus F. Voorhies, beginning on page 43, and ending on page 54, of the Transcript, Afternoon Session.
12. Testimony of Armin Barteldes, beginning on page 58, and ending on page 59, of the Transcript, Afternoon Session.
13. Testimony of W. P. Stubbs, beginning on



page 10, and ending on page 20 of the Transcript, Morning Session.

14. Plaintiff's Exhibits "4," "5," "6" and "7."
15. Defendant's Exhibit "A."
16. This designation of record.

Dated: November 14th, 1950.

/s/ JAMES I. HARKINS,

/s/ ALBERT E. CRONIN, JR.,  
Attorneys for Defendant-  
Appellant.

Affidavits of Service by Mail attached.

[Endorsed]: Filed November 16, 1950.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS  
OF THE RECORD REQUESTED BY AP-  
PELLEE

To the Clerk of the Circuit Court of Appeals of the  
United States, for the Ninth Circuit:

Plaintiff and Appellee hereby designates the fol-  
lowing additional portions of the record, proceed-  
ings and evidence to be included in the permanent  
record in the above-entitled cause:

1. Minute Order of the United States District  
Court dated December 31, 1948;
2. Order of Court dated July 24, 1950, amending

Finding No. VII and denying the motion for the amendment of other findings, and denying the motion for new trial;

3. Notice of Entry of Judgment dated June 21, 1950;

4. Memorandum and Order of United States District Court dated May 10, 1950;

5. All of the testimony of W. P. Stubbs, being the whole of the deposition of said W. P. Stubbs admitted or read in evidence;

6. Testimony of Armin Barteldes, page 2, of the Reporter's Transcript;

7. Testimony of James William Hamilton, beginning on page 54, and ending on page 58, of the Reporter's Transcript;

8. Plaintiff's Exhibit Number 9;

9. This designation of additional portions of the record.

Dated this 27th day of November, 1950.

Respectfully submitted,

MULL & PIERCE and  
KENAZ HUFFMAN, ESQ.,

By /s/ F. R. PIERCE,

Attorneys for Plaintiff and  
Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 28, 1950.